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No. 02-

In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

NATHANIEL TRULL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Federal Rule of Civil Procedure 49, a party waives its objection to the entry of judgment in a manner inconsistent with the jury's finding on a mixed question of law and fact by failing to note the inconsistency before the jury is discharged.

2. Whether, under Federal Rule of Civil Procedure 51, a defendant's failure to object to the submission of a case to the jury on multiple liability theories waives a subsequent argument that the jury's findings on those theories are inconsistent.

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 29.6

The petitioners are Volkswagen of America, Inc. and Volkswagen, AG. The respondents are Nathaniel Trull, PPA David Trull and David Trull, Administrator of the Estate of Benjamin Trull.

Volkswagen of America, Inc., has a parent, Volkswagen Beteiligungs-Gesellschaft mbh, which is a wholly-owned subsidiary of Volkswagen, AG. No publicly held company owns ten percent or more of Volkswagen, AG's stock.

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PETITION FOR A WRIT OF CERTIORARI

Volkswagen of America, Inc. and Volkswagen, AG ("Volkswagen") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 19a-29a) is unreported. The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 320 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2002. App., *infra*, 32a-33a. A timely petition for rehearing was denied on February 11, 2003. *Id.* at 30a-31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the construction of Rules 49 and 51 of the Federal Rules of Civil Procedure, which are reproduced at App., *infra*, 47a-48a.

STATEMENT

In this product liability action, plaintiffs' claims under both their strict liability and negligence theories depended upon proof that Volkswagen had manufactured a vehicle that was defective in design. At the conclusion of the trial, the jury made an express and unequivocal finding in the "special verdict" forms that the vehicle did *not* have the claimed design defect. In contravention of the jury charge and the applicable law, however, the jury also found that Volkswagen had been negligent in manufacturing the vehicle. Rejecting Volkswagen's argument that it could not be held liable under

any theory without proof of a design defect, the district court entered a $10 million judgment against Volkswagen based on the negligence finding. The court of appeals refused to entertain Volkswagen's contention that the jury's findings were irreconcilably at odds, concluding that Volkswagen had waived its objections to the verdict inconsistency – first, by failing to object to the submission of overlapping liability theories to the jury and, second, by failing to note the inconsistencies within the verdict before the jury was discharged.

Both grounds for the First Circuit's waiver determination are the subject of persistent conflicts among the courts of appeals. Although Rule 49 verdict forms are commonly employed to lend clarity to the jury's determinations in complex cases, courts disagree about the most basic aspects of practice under the Rule, and these differences often determine the outcome of cases. Because it chose to apply a stringent waiver rule, the court below refused even to consider the effect of the jury's "no-defect" finding in this case, a dispositive event under New Hampshire law. But most other courts *would* have reached the merits of Volkswagen's challenge to the entry of judgment. These courts do *not* require defendants to object to the submission of alternative theories that may result in inconsistencies, nor do they insist that parties point out inconsistencies of this type before the jury is discharged.

The current treatment of Rule 49 frustrates the goal of national uniformity in federal practice. Unless this Court intervenes, a regular feature of federal jury trials will remain a source of confusion, inefficiency, and injustice. Review of the decision below clearly is warranted.

1. In February 1991, David and Elizabeth Trull and their two sons, Nathaniel and Benjamin, were driving in New Hampshire when their 1986 Volkswagen Vanagon slid on black ice and collided with another vehicle. Benjamin died, Elizabeth suffered severe brain injuries, and Nathaniel suffered a head injury. Nathaniel and Benjamin were seated in the rear middle

seat of the Vanagon, which was equipped with lap-only belts. The front seat, where Elizabeth was seated, had combination lap/shoulder belts. R. 620-625.

In January 1994, David Trull, on behalf of Benjamin's estate and Nathaniel, sued Volkswagen in the United States District Court for the District of New Hampshire, invoking the court's diversity jurisdiction. Plaintiffs contended that the 1986 Vanagon had been defectively designed because it was equipped with lap-only belts in the rear seats and that Nathaniel's and Benjamin's injuries were more severe than they would have been had their seats been equipped with combination lap/shoulder belts.

Following a trial, a jury returned verdicts for defendants, and the plaintiffs appealed. The court of appeals rejected plaintiffs' other challenges to the judgment, but it certified to the New Hampshire Supreme Court a question regarding which party bears the burden of apportioning the injuries attributable to the manufacturer in a crashworthiness case. *Trull* v. *Volkswagen of Am., Inc.*, 187 F.3d 88, 103 (1st Cir. 1999). After the New Hampshire Supreme Court ruled that the burden of apportioning injury shifts to the defendant after the plaintiff demonstrates that a design defect contributed to an increase in his or her injuries from a collision (*Trull* v. *Volkswagen of Am., Inc.*, 761 A.2d 477, 482 (N.H. 2000)), the First Circuit concluded that the district court's instructions on that issue were erroneous and remanded the case for a new trial. *Trull* v. *Volkswagen of Am., Inc.*, 229 F.3d 343 (1st Cir. 2000).

2. The second trial commenced on April 3, 2001. As the court of appeals later recognized, "[t]he evidence was essentially the same as to both theories of liability." App., *infra*, 2a. To establish both strict liability and negligence, plaintiffs relied on the testimony of their experts (strongly contested by defendants) that combination lap/shoulder belts in rear seats provide more safety in an accident than lap-only belts and that the availability of lap/shoulder belts in the rear seat

would have decreased the severity of the boys' injuries in this case.

The district court itself crafted the jury instructions. Consistent with plaintiffs' wishes and with state law establishing that "[a] strict liability action based upon a theory of defective design may be joined with an action grounded in negligence" (*Trull*, 761 A.2d at 481), the court instructed the jury on both theories of liability. In light of the New Hampshire Supreme Court's ruling *in this very case* a few months before trial that plaintiffs could rely on both theories (*ibid.*), and since asserting the contrary would be legally erroneous, Volkswagen did not object to this aspect of the instructions, which stated that the jury could find in favor of plaintiffs on strict liability *or* negligence. App., *infra*, 37a-38a. Volkswagen considered its interests to be protected by other parts of the jury charge, which made it clear that Volkswagen could not be held liable under *either* theory unless the jury concluded that the use of lap-only belts in the rear seats rendered the Vanagon defective in design.

For example, the instructions described plaintiffs' negligence claim as contending that defendants' lack of due care "resulted in *the claimed defect* in the vehicle; namely, the vehicle lacked lap/shoulder belts in the rear seating positions." *Id.* at 41a (emphasis added). In addition, the proximate cause instruction regarding negligence specified that "[i]f the injury would have occurred anyway without any defect in the design of the vehicle, then *the design defect* would not be a proximate cause of the injury." *Id.* at 43a (emphasis added).

Furthermore, the district court instructed the jury that "plaintiffs *both under their strict liability and negligence claims*, have the burden of proving by a preponderance of the evidence that *the claimed design defect* was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision." App., *infra*, 44a (emphasis added). Similarly, with respect to the order of proof, the court stated:

> With respect to each plaintiff, first you will determine if the plaintiff has met his burden of proving by a preponderance of the evidence under his claim of strict liability or negligence that *the claimed design defect* was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision. If the plaintiff fails to meet his burden on both claims, you will conclude your deliberations.

Id. at 45a (emphasis added).[1]

After giving the instructions, the district court submitted to the jury, for each plaintiff, a three-page document entitled "Special Verdict Form." App., *infra*, 34a-36a. The verdict forms, like the jury instructions, were crafted by the court itself. Each form included the following seven questions:

> Strict Liability
>
> 1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating position?
>
> _____
> (Yes or No)
>
> (If you answered "Yes" to question 1, answer question 2.)
>
> (If you answered "No" to question 1, go to question 3.)[2]
>
> 2. Do you find by a preponderance of the evidence that the defective condition caused, or substantially caused, injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

---

[1] Indeed, the instructions bearing on the negligence count include no fewer than 17 references to the concept of design defect. App., *infra*, 37a-46a.

[2] These directions on the verdict form appeared in much smaller type than the questions themselves.

_____
(Yes or No)

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

_____
(Yes or No)

(If you answered "Yes" to question 3, answer question 4.)

(If you answered "No" to question 3, skip question 4 and go to the bottom of this page for further instructions.)

4. Do you find by a preponderance of the evidence that the defendant's negligence in designing and testing the 1986 Vanagon caused or contributed to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

_____
(Yes or No)

Further Instructions

If you have answered "Yes" to question 1 *and* question 2, and/or question 3 *and* question 4, then proceed to question 5.

Otherwise, conclude your deliberations.

Allocation of Injuries

5. Do you find that the defendant has proved by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect?

_____
(Yes or No)

Damages – Answer Question 6 *or* Question 7, as appropriate.

6. Assess the total amount of damages sustained by Nathaniel Trull as a result of the accident in question.

_____

(Words, not figures.)

7. Assess the amount of damages sustained by Nathaniel Trull during the accident in question which are attributable to the design defect.

_____

(Words, not figures.)

The jury returned its verdict on April 20, 2001, in a court session that lasted a total of ten minutes. The judge greeted the jurors, read the verdicts silently to himself, and then had the clerk read both special verdict forms aloud. R. 2502. On both verdict forms, the jury had answered "no" to Question 1; had not answered Question 2; had answered "yes" to Questions 3 and 4; and had answered "no" to question 5. In its answers to question 6, the jury indicated that as the result of the accident Nathaniel Trull sustained damages of $8,917,335.27 and that Benjamin Trull's estate sustained damages of $1,290,980.70. The jury did not answer question 7, which asked the jury to specify the damages "which are attributable to the design defect."

The district court then asked the jurors to confirm that the verdicts were unanimous and instructed the clerk "to enter judgment in accordance with the special findings of the jury." R. 2505. Thereafter, without addressing counsel or granting them the time to consider the jury's answers, the court thanked and dismissed the jurors and immediately left the courtroom. *Ibid.*

After having the opportunity to review and consider the verdicts, Volkswagen concluded that the jury's "no" response to question 1 on the verdict form (the only question explicitly and directly asking the jury whether there was a design defect)

was inconsistent with the entry of judgment against Volkswagen. Under the instructions and New Hampshire law, the jury was not permitted to find Volkswagen liable under *either* strict liability *or* negligence unless it concluded that the vehicle had a design defect that exacerbated the plaintiffs' injuries. By giving a negative answer to question 1, the jury had made a factual finding that the 1986 Vanagon did *not* have a design defect. In these circumstances, the jury's finding in response to question 3 that Volkswagen was negligent in designing and/or testing the vehicle could not support the entry of judgment against Volkswagen, because the jury had already concluded that any lapse in due care *had not resulted in the creation of a defective vehicle*.[3]

Accordingly, Volkswagen filed a motion for judgment or a new trial. The district court denied the motion, concluding without any explanation whatsoever that the jury's responses to the questions were not inconsistent. App., *infra*, 20a. It also ruled that Volkswagen had waived its right to challenge any inconsistency in two ways – first, by failing "to object to the appropriateness of instructing the jury on the two theories of liability" (*id.* at 21a), and, second, by failing to bring the inconsistency to the court's attention before the jury was discharged. *Ibid.*

---

[3] At the same time, the jury's finding that the vehicle did not have a design defect was *consistent* with its responses to questions 5, 6, and 7. The jury's conclusion that there was no defect would have precluded any finding in response to question 5 that Volkswagen had proven "which injuries were attributable to the initial collision and which to the design defect," and would have made it impossible for the jury to answer question 7, which asked the jury to specify "the amount of damages sustained by [each boy] during the accident in question which are attributable to the design defect." App., *infra*, 36a. But it would not have prevented the jury from assessing, in its answers to question 6, the "total amount of the damages sustained * * * as the result of the accident." *Ibid.*

3. The First Circuit affirmed. The court of appeals first held that "VW's failure to follow the applicable Rule of Civil Procedure bars its appeal." App., *infra*, 4a. Ignoring the fact that the district court and the parties had repeatedly characterized the verdicts in this case as Rule 49(a) special verdicts, as well as the fact that no single question on the verdict form called for an ultimate finding of liability, the court of appeals concluded that questions 1 and 3 "were general verdict forms under Rule 49(b)." *Id.* at 5a. Citing its prior rulings that "under Rule 49(b), objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged" (*ibid.*), the court concluded that "VW forfeited its objection to the alleged inconsistency by failing to object at any time prior to the jury's discharge." *Ibid.*

The court of appeals also held that Volkswagen gave up its right to raise the inconsistency by failing to object to the jury instructions, which "made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence." App., *infra*, 6a. In the court's view, "a failure to object as required by Rule 51 deprives the non-objecting party of review under Rule 61, either before the trial court on a post-trial motion or on appeal." *Ibid.*

In a similar vein, the court of appeals concluded that, because Volkswagen "did not object to the verdict forms at any time prior to their submission to the jury," it had "waived its right to object to any foreseeable combination of proper responses to the questions posed on the verdict forms." App., *infra*, 4a. The court rejected Volkswagen's argument that it should not have been required to object *before* the submission of the case to the jury because "the verdicts did not become inconsistent until after the jury had completed them." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

General verdicts "simply ask the jury to answer the question 'who won,' and if the winning party is entitled to a monetary

award, to answer the question 'how much.'" *Turyna* v. *Martam Constr. Co., Inc.*, 83 F.3d 178, 181 (7th Cir. 1996). To focus the jury's attention on the key issues and elucidate its reasoning, federal district courts may employ two alternatives to the general verdict. Under Rule 49(a), the court may submit a "special verdict in the form of a special written finding upon each issue of fact." Fed. R. Civ. P. 49(a). Alternatively, under Rule 49(b), the court may submit, "together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed. R. Civ. P. 49(b).

When things go as intended, Rule 49 verdict forms can assist trial and appellate courts "in directing a comprehensive, final disposition to the case without infringing in the slightest upon the inviolate nature of the jury trial and resolution." Hon. Brown, J., *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 347 (1967)). Sometimes, however, the jury's answers to the questions on a verdict form conflict with one another and do not unequivocally support judgment for either party. Because such inconsistencies occur with some regularity, one would expect the federal courts to have developed clear rules for dealing with them. In fact, the courts appear to have given up hope of any kind of uniformity. The case law regarding verdict inconsistencies has become a minefield, riddled with conflicts and fraught with the risk of inadvertent waiver of substantive rights.

First, the courts of appeals disagree about what defendants must do to raise and preserve their objections to the jury's inconsistent responses to verdict questions. There is a well-established conflict among the circuits concerning whether a party waives any objection based on verdict inconsistency unless it is raised *before* the jury is discharged. Because in many circuits the answer depends upon whether the verdict is governed by Rule 49(a) or Rule 49(b), that question raises a subsidiary, and even more fundamental, conflict: the circuits do not agree about which sorts of verdict forms are "special

verdicts" governed by Rule 49(a) and which are "general verdicts with interrogatories" governed by Rule 49(b).

Second, there exists a significant conflict regarding the obligation to object to the submission of multiple liability theories that may result in inconsistent verdicts. Several courts have ruled that the defendant must object to having the jury instructed on multiple, overlapping legal theories or waive its right to challenge inconsistencies in the jury's findings on those theories. Other courts, however, have routinely addressed this common type of verdict inconsistency without imposing such an extraordinary waiver rule.

This case cleanly presents each of these conflicts. Despite the fact that they were labeled "special verdicts" and that the parties and the district court plainly regarded them as such, the court of appeals decided after the fact that the verdict forms were "general verdicts" governed by Rule 49(b). Having thus recharacterized the verdict forms, the court ruled that Volkswagen was required to point out the inconsistencies within the verdicts *before* the jury was discharged. Most other courts, however, treat similar verdict forms as "special verdicts" governed by Rule 49(a) and will consider objections to such verdicts that are raised *after* the jury is discharged.

The court of appeals also held that Volkswagen waived its right to challenge the inconsistency within the verdicts because it had not objected to the instruction of the jury on both strict liability and negligence theories. The court applied this waiver doctrine despite the fact that the submission of both counts was plainly permissible under New Hampshire law and that any objection not only would have been futile but would have relied on an incorrect assertion of applicable law. In so ruling, the court was in a distinct minority: only one other circuit places the burden on defendants to predict and seek to forestall verdict inconsistencies. Most federal courts recognize that, where state law gives the plaintiff the prerogative to submit overlapping theories to the jury, the *plaintiff* bears the risk that the jury's findings on those theories will conflict. In contrast to the

decision below, these courts do not deprive defendants of their ability to challenge inconsistent verdicts merely because they acceded to the plaintiffs' permissible trial strategy.

The issues presented by this case are both significant and recurring. The confusion and disagreement regarding the proper characterization of Rule 49 verdicts and the timing of objections have plagued federal trial practice for years, creating substantial inefficiencies and leading frequently to the forfeiture of substantive rights. These issues have the potential to arise in every federal case in which a Rule 49 verdict form is used and have been addressed in scores of published decisions, which have nonetheless failed to resolve the confusion. It is clear by now that no degree of uniformity – a principal goal of the Federal Rules of Civil Procedure – will ever be achieved without this Court's intervention.

The conflict regarding the defendants' obligation to point out *possible* inconsistencies *before* the verdict is submitted also merits the Court's attention. Applying state law in diversity cases, most federal courts routinely permit plaintiffs to send their cases to the jury on overlapping theories such as strict liability, breach of warranty, and negligence. Requiring defendants to object to this practice, or sacrifice their right to object to any resulting inconsistencies, places federal procedure squarely at odds with state substantive law. Indeed, it forces defendants to make objections asserting incorrect statements of law – a burlesque that elevates mistaken form over substance. Moreover, the imposition by a few circuits of this harsh and demanding waiver rule makes the outcome of cases depend on where they have been filed. To correct this gross departure from uniformity in federal procedure, review of this case clearly is warranted.

I. THERE IS A CONFLICT IN THE CIRCUITS REGARDING WHETHER, AND UNDER WHAT CIRCUMSTANCES, A PARTY MUST OBJECT TO AN INCONSISTENCY IN A RULE 49 VERDICT BEFORE THE JURY IS DISCHARGED

As a leading treatise has noted, there has been "much litigation and disagreement among the circuit courts as to the prerequisites for preserving objections to inconsistencies"in a jury verdict. 9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 49.02[2][d] (3d ed. 1997). There is a mature split among the courts of appeals on the question whether a party seeking to challenge a verdict as inconsistent must do so before the jury is discharged. According to many courts, the rule differs depending on whether the verdict is characterized as a special verdict governed by Fed. R. Civ. P. 49(a) or as a general verdict with interrogatories governed by Fed. R. Civ. P. 49(b). See, *e.g.*, *Simmons* v. *City of Phila.*, 947 F.2d 1042, 1057-1058 (3d Cir. 1991); *Bonin* v. *Tour W., Inc.*, 896 F.2d 1260, 1262-1263 (10th Cir. 1990). Yet distinguishing one type of verdict from the other also has confused and divided the courts. This case presents an opportunity for the Court to resolve these festering disagreements.

A. The Case Presents An Important And Recurring Issue Concerning The Distinction Between Rule 49(a) Special Verdicts And Rule 49(b) General Verdicts With Interrogatories, As To Which There Is A Conflict Among The Circuits

The procedures for handling inconsistencies in Rule 49 verdicts depend on whether they are governed by Rule 49(a) or Rule 49(b). When inconsistencies arise within a special verdict under Rule 49(a), this Court has explained that the court must attempt to harmonize the jury's answers and enter judgment accordingly. See *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963) ("it is the duty of the courts to attempt to harmonize the answers"); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U.S.355, 364 (1962) ("[w]here there

is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"). If harmonization is impossible, the court must order a new trial. See, *e.g.*, *Brooks* v. *Brattleboro Mem'l Hosp.*, 958 F.2d 525, 529-530 (2d Cir. 1992); *Riley* v. *K Mart Corp.*, 864 F.2d 1049, 1054-1055 (3d Cir. 1988).

Unlike Rule 49(a), Rule 49(b) expressly prescribes the proper course when inconsistencies appear in a general verdict with interrogatories:

> When the answers [to interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdicts or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. R. Civ. P. 49(b).

Thus, the proper manner of addressing inconsistencies depends in material respects on whether a special verdict or a general verdict with interrogatories is involved. Moreover, as noted above, in many circuits the form of the verdict determines *when* a party must object to any inconsistencies. If these rules are to be applied sensibly and predictably, both the district court and the parties obviously need to understand what type of verdict they are dealing with.

Nevertheless, the courts of appeals have admitted to a surprising degree of confusion about how to tell one sort of verdict from the other. See, *e.g.*, *Mason* v. *Ford Motor Co.*, 307 F.3d 1271, 1274-1275 (11th Cir. 2002) ("Categorizing a verdict as a general verdict, or as a special verdict under Rule 49(a), or as a general verdict with special interrogatories under

Rule 49(b) should be – but too often seems not – a simple matter."); *Turnya*, 83 F.3d at 179 (the "case was submitted to the jury on a form that wasn't quite a general verdict form, but wasn't special verdicts under Federal Rule of Civil Procedure 49(a) or a general verdict with interrogatories under Rule 49(b) either"); *Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n.16 (3d Cir. 1993) ("as in many cases, it is not entirely clear whether the verdict is governed by Fed. R. Civ. P. 49(a) or 49(b)"); *Arachnid, Inc.* v. *Medalist Mktg. Corp.*, 972 F.2d 1300, 1303 n.3 (Fed. Cir. 1992) ("The distinction between special verdicts and special interrogatories is unclear."); *Putnam Res.* v. *Pateman*, 958 F.2d 448, 455 (1st Cir. 1992) ("the record is unclear as to whether the case was given to the jury under Rule 49(a) or 49(b)"). Indeed, there is no agreement over whether even the most common sorts of verdict forms are governed by Rule 49(a) or Rule 49(b).

In particular, the issue of whether a series of mixed questions of law and fact is governed by Rule 49(a) or Rule 49(b) has confused and divided the courts of appeals. In conflict with the decision below, the Third, Fourth, Fifth and Tenth Circuits have determined that verdict forms that contain mixed questions of law and fact, but that do not ask the jury to make an ultimate finding of liability, are special verdicts governed by Rule 49(a). See, *e.g.*, *Simmons*, 947 F.2d at 1057 ("special verdicts under Rule 49(a) may * * * constitute findings of fact that actually blend factual with legal conclusions"); *McCollum* v. *Stahl*, 579 F.2d 869, 870-871 (4th Cir. 1978) (concluding that questions asking jury to determine whether defendant discharged plaintiff "wrongfully" and whether the discharge was "maliciously, wantonly, or oppressively done" comprised a special verdict under Rule 49(a)); *Costilla* v. *Aluminum Co. of Am.*, 826 F.2d 1444, 1446, 1448 n.6 (5th Cir. 1987) (concluding that a series of questions asking the jury to make findings regarding design defect, negligence, proximate causation, and damages comprised a Rule 49(a) special verdict); *Alvarez* v. *J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1039 & n.1 (5th Cir. 1982)

(interrogatories regarding negligence, unseaworthiness, causation and damages were submitted under Rule 49(a)); *Bonin*, 896 F.2d at 1262-1263 (questions regarding negligence, proximate causation, and damages submitted under Rule 49(a)). In contrast, the Second Circuit, like the First Circuit, has ruled that verdict forms such as the ones employed in this case are governed by Rule 49(b). See *Jarvis* v. *Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir.), cert. denied, 123 S. Ct. 539 (2002).

The decision below is a prime example of the complete unpredictability of decisions on this issue. Here, the verdict forms were labeled as "special verdicts," and the parties and the district court all referred to them as such. Each verdict form contained seven mixed questions of law and fact pertinent to Volkswagen's liability, but did not seek a general determination that Volkswagen was or was not liable. Accordingly, there was no question on either form that satisfied the widely accepted definition of "general verdict." See BLACK'S LAW DICTIONARY 1555 (7th ed. 1999) (in rendering a general verdict, the jury simply "finds in favor of one party or another, as opposed to resolving specific fact questions").

Ignoring the conventional understanding of the term – and giving no weight whatsoever to what the parties and the district court considered the forms to be – the First Circuit nevertheless concluded that questions 1 and 3 were "general verdicts" on strict liability and negligence, respectively. That conclusion is wholly mysterious. Those two questions asked for findings as to whether the vehicle had the claimed design defect and whether Volkswagen had been negligent in the design or testing of the vehicle; they did not address other elements of liability including, most crucially, whether the purported defect and/or negligence caused or exacerbated the plaintiffs' injuries.[4]

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[4] As the district court explained in its instructions, Volkswagen could not be held liable in this "crashworthiness" case unless the jury concluded that "the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused

Accordingly, affirmative answers to those questions were incapable, standing alone, of constituting findings that Volkswagen was liable and thus comprising "general verdicts."

Moreover, the First Circuit's decision, after the fact, to recharacterize what had been called "special verdicts" as "general verdicts" raises serious fairness concerns. In contrast, in determining whether Rule 49(a) or Rule 49(b) governs the proceedings, the Ninth Circuit has recognized that it is improper to recharacterize a verdict retroactively and has given great weight to what the district court and the parties *called* the verdict form. See *Floyd* v. *Laws*, 929 F.2d 1390, 1396 (9th Cir. 1991) (holding that the interrogatories to the jury "constituted a special verdict, simply because that is what the trial court declared them to be"). The First Circuit's failure to recognize the importance of this factor provides an additional reason to review its decision.

B. This Case Presents The Issue Of Whether, And Under What Circumstances, A Party Must Point Out Inconsistencies In A Verdict Before The Jury Is Discharged

The First Circuit's decision also exacerbates the well-established conflict among the circuits regarding the preservation of objections to verdict inconsistencies. Some circuits require that verdict inconsistencies be raised before the jury is discharged, but others do not. In some circuits, such an objection must be made when the verdict falls under Rule 49(b) – which expressly permits re-submission of the case to the jury in certain circumstances – but not when the verdict has been

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as a result of the original collision. " App., *infra*, 44a. That key issue was addressed by separate questions 2 and 4. In deciding that questions 1 and 3 were general verdicts, the court of appeals seemed to ignore the very existence of these other questions. Indeed, the court below indicated that "there were no written interrogatories submitted to the jury." *Id.* at 5a. It is unclear what importance, if any, the court assigned to questions 2, 4, 5, 6, and 7.

issued under Rule 49(a). See, *e.g.*, *Bonin*, 896 F.2d at 1263. The waiver rule can be quite harsh, allowing entry of judgment *for the wrong side* because counsel did not object in the few moments after the verdict was read and before the jury was released. Such a rule, if appropriate, at least should be applied uniformly and consistently. Granting certiorari in this case would give the Court the opportunity to address this significant divergence in federal procedure.

When inconsistencies appear within a special verdict rendered under Rule 49(a), the Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits have held that a party may seek relief without raising an objection before the jury is discharged. See *Auwood* v. *Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-891 (2d Cir. 1988); *Simmons*, 947 F.2d at 1057; *Ladnier* v. *Murray*, 769 F.2d 195, 198 n.3 (4th Cir. 1985); *Alvarez*, 674 F.2d at 1040-1041; *Pierce* v. *Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Resolution Trust Corp.* v. *Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993). These courts apparently accept the view that "[t]he legal error resulting from the entry of a judgment based on inconsistent special interrogatories is one which undermines the validity and integrity of the judgment and may, in fact, run afoul of the Seventh Amendment by allowing the District Court to usurp the jury's function." *Mercer* v. *Long Mfg. N.C., Inc.*, 671 F.2d 946, 948 n.1 (5th Cir. 1982); see also *Ladnier*, 769 F.2d at 198 n.3 (citing *Mercer*); *Auwood*, 850 F.2d at 890-891 ("proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding").

On the other hand, the Eleventh Circuit requires that objections to inconsistencies in a Rule 49(a) special verdict be made before discharge of the jury. See, *e.g.*, *Golub* v. *J.W. Gant & Assocs.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *Mason*, 307 F.3d at 1274 n.4 (acknowledging conflict on this issue between pre-1981 Fifth Circuit precedent and later decisions of the Eleventh Circuit, but concluding that "we can leave to

another day the task of untangling these seemingly inconsistent special verdict precedents"). The First Circuit has required pre-discharge objections without distinguishing between Rule 49(a) and Rule 49(b) (see, *e.g.*, *Skillin* v. *Kimball*, 643 F.2d 19, 20 (1st Cir. 1981)) and has imposed the waiver rule in a few cases involving Rule 49(a) (see, *e.g.*, *Bonilla* v. *Yamaha Motor Corp.*, 955 F.2d 150, 152 n.2, 155-156 (1st Cir. 1992)). Nevertheless, the court below expressly tied its finding of waiver to its conclusion that the verdicts were governed by Rule 49(b) (App., *infra*, 4a-5a), suggesting that it might have decided the issue differently had it concluded that Rule 49(a) applied.

The balance of authority differs when a verdict is rendered under Rule 49(b). Most courts that have addressed the issue, including the First, Fourth, Fifth, Seventh and Tenth Circuits, have held that objections involving inconsistencies in Rule 49(b) verdicts must be raised before the discharge of the jury. See *Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), aff'd on other grounds, 462 U.S. 650 (1983); *Austin* v. *Paramount Parks, Inc.*, 195 F.3d 715, 726 (4th Cir. 1999); *Stancill* v. *McKenzie Tank Lines Ltd.*, 497 F.2d 529, 534-535 (5th Cir. 1974); *Cundiff* v. *Washburn*, 393 F.2d 505, 507 (7th Cir. 1968); *Diamond Shamrock Corp.* v. *Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1422-1433 (10th Cir. 1986).

Other courts, however, have ruled that the obligation to address an inconsistency within a Rule 49(b) verdict is not contingent on any party's objection. In *Los Angeles Nut House* v. *Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987), the Ninth Circuit found that a waiver rule – which "permits the party in whose favor the general verdict runs to prevail merely by remaining silent" (*id.* at 1354) – is "inconsistent with the language and structure of Rule 49(b)." *Ibid.* (internal citations omitted).[5] The Second Circuit has similarly concluded that "the

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[5] As noted above, Rule 49(b) gives preference to specific over general findings: it allows the court to disregard a general verdict that contradicts the jury's answers to interrogatories on issues of fact, but

terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made." *Schaafsma* v. *Morin Vt. Corp.*, 802 F.2d 629, 634 (2d Cir. 1986) (internal citation and quotation marks omitted).

The decision below squarely frames this multi-faceted conflict. Some courts – including at least the Third, Fourth, Fifth and Tenth Circuits – would treat the verdict forms here as special verdicts submitted under Rule 49(a). Because these courts do not require inconsistencies in such verdicts to be raised before the jury is discharged, they would not have found that, by failing to make such an objection, Volkswagen waived its right to object to the entry of judgment for plaintiffs. The Ninth Circuit, similarly, does not require pre-discharge objections to the entry of judgment inconsistent with a factual finding by the jury. See *Pierce*, 823 F.2d at 1370 (Rule 49(a) "does not require objections before discharge of the jury"); *Los Angeles Nut House*, 825 F.2d at 1356 (waiver rule that would "permit the wrong party – the one favored by the jury's general verdict – to obtain a judgment * * * is not a sensible reading of Rule 49(b)"). In contrast, because it appears to require pre-discharge objections to inconsistencies for *all* types of Rule 49 verdicts, the Eleventh Circuits might well have agreed with the First Circuit and found waiver in this case.

C. These Conflicts Recur Frequently And Create Substantial Inefficiencies

These conflicts in the application of Rule 49 are both significant and recurring. The issues at stake have the potential to arise in every jury trial in federal court, and they frequently determine the outcome of cases. The need for clear and consistent rules in this area is substantial.

First, the absence of uniformity regarding the obligation to raise objections to inconsistent verdicts creates great

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does not authorize the entry of judgment in a manner that conflicts with one of the jury's responses to factual interrogatories.

inefficiency. To avoid forfeiture of their clients' rights, attorneys practicing in federal courts across the country must learn and follow a multiplicity of different local constructions of Rule 49. Not only must they determine for each type of verdict whether an objection before jury discharge is necessary to preserve a claim of verdict inconsistency, but they also must research local decisions in an effort to discern whether a particular form of verdict will be deemed a special verdict or a general verdict with interrogatories. Even within some circuits, the decisions are so inconsistent that it is impossible to predict how a court will view a particular verdict form. Attorneys used to practicing in one jurisdiction may be surprised to learn – after the fact – that Rule 49 is construed differently in another jurisdiction. Extensive briefing often is required to resolve these seemingly basic questions. Needless to say, the drafters of the federal rules did not intend to create this sort of disarray. See Fed. R. Civ. P. 1 (the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

Second, the confusion surrounding practice under Rule 49 diminishes the credibility of federal jury trials and leads to substantial injustice, by permitting the entry of judgment in a manner that ignores both the jury's findings on factual issues and the state law that the court is supposed to apply. This case is a good example. After a several-week trial in which plaintiffs sought to hold Volkswagen liable for manufacturing a defectively designed vehicle, the jury indicated in response to a straightforward factual interrogatory that the plaintiffs did not prove the existence of the claimed design defect. Volkswagen had a strong case to make under state law that the "no defect" finding entitled it to judgment in its favor, despite the fact that the jury also found Volkswagen to have been negligent. See, *e.g.*, *Greenland* v. *Ford Motor Co.*, 347 A.2d 159, 163 (N.H. 1975).[6] At the very least, Volkswagen had a powerful argument

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[6] See also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998), reporter's note to comment n (plaintiff's "failure to meet the

that it was entitled to a new trial because the jury's findings were irreconcilably inconsistent. Moreover, the case involved what appeared to be (and was called) a "special verdict" under Rule 49(a), as to which, in most parts of the country, inconsistencies may be raised after the jury is discharged. After inexplicably recharacterizing the verdict as one under Rule 49(b) rather than Rule 49(a), however, the First Circuit upheld a verdict of more than $10 million against Volkswagen, without addressing the merits of Volkswagen's argument that this outcome improperly ignored the jury's central factual determination. This resolution both "undermine[d] the validity and integrity of the judgment" and "usurp[ed] the jury's function" (*Mercer*, 671 F.2d at 948 n.1), raising concerns of constitutional magnitude.

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requisites of § 2(a) [manufacturing defect], (b) [design defect], or (c) [inadequate warnings] will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability."). The law in many states is the same. See, *e.g.*, *Garrett* v. *Hamilton Standard Controls, Inc.*, 850 F.2d 253, 257 (5th Cir. 1998) ("a manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective"); *Sprankle* v. *Bower Ammonia & Chem. Co.*, 824 F.2d 409, 413 (5th Cir. 1987) (by rejecting strict liability claim, jury necessarily rejected essential element of negligence); *Chestnut* v. *Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971) (to establish negligence, plaintiff must prove that the product was dangerously defective when it left the plaintiff's hands); *Lecy* v. *Bayliner Marine Corp.*, 973 P.2d 1110 (Wash. App. 1999), rev. denied, 994 P.2d 845 (Wash. 2000) (where design defect was focus of plaintiff's case, verdict finding no defect in product design established "as a matter of law" that manufacturer was not negligent); *Montez* v. *Ford Motor Co.*, 161 Cal. Rptr. 578, 581 (4th Dist. 1980) ("jury determination of the non-existence of any defect was fatal to the theory of recovery based on negligence or on strict liability"); *Masi* v. *R.A. Jones Co.*, 394 A.2d 888, 891 (App. Div. 1978) ("the determination by a jury that defendant was not liable on the theory of strict liability eliminated the possibility that defendant could be guilty of negligence").

Finally, the outcome here would have been entirely different had the court of appeals adhered to the approach of most other courts. For cases to turn on regional variations in the construction of the federal rules severely undermines their purpose. *Cf.* Fed. R. Civ. P. 83(a)(1) (local district court rules "shall be consistent with * * * Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075").

The Court has on many occasions granted certiorari to address "threat[s] to the goal of uniformity of federal procedure." *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965). See also *Weisgram* v. *Marley*, 528 U.S. 440, 446 (2000) (certiorari granted because "[c]ourts of [a]ppeals have divided on the question" of the authority of appellate courts to direct entry of judgment as a matter of law); *Schlagerhauf* v. *Holder*, 379 U.S. 104, 109 (1964) ("[w]e granted certiorari to review undecided questions regarding the validity and construction of Rule 35"); *Hickman* v. *Taylor*, 329 U.S. 495, 497 (1947) ("[t]his case presents an important problem under the Federal Rules of Civil Procedure"). It should do so here.

II. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER, UNDER RULE 51, A DEFENDANT MUST OBJECT TO THE SUBMISSION TO THE JURY OF MULTIPLE THEORIES IN ORDER TO PRESERVE ITS RIGHT TO CHALLENGE AN INCONSISTENCY IN THE VERDICT

The First Circuit also rested its waiver determination on the fact that Volkswagen did not object to the submission of both strict liability and negligence theories to the jury. Despite the fact that it was plaintiffs' prerogative under New Hampshire law to rely on both theories, the court of appeals held that Volkswagen was required to challenge this aspect of the jury instructions in order to preserve its right to object to any later inconsistency in the jury's findings. App., *infra*, 6a. The court also stated that Volkswagen "waived its right to object to any foreseeable combination of proper responses to the questions

posed on the verdict forms." *Id.* at 4a. In contrast, most other circuits sensibly evaluate the preservation of objections to inconsistencies by assessing the objecting party's conduct *after* the inconsistent verdict is announced, rather than requiring the defendant to make fruitless objections to practices that are plainly permissible under state law. This case thus provides the Court with the opportunity to address another significant and recurring conflict among the courts of appeals.

1. The decision below follows another recent decision of the First Circuit, in which the court held that the defendant was precluded under Rule 51 from arguing that a verdict was inconsistent because it had not "objected to the submission to the jury of both * * * strict liability and negligence claims." *Babcock* v. *General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002). Those rulings are consistent with several decisions of the Second Circuit. See *Jarvis*, 283 F.3d at 53-65; *Higgins* v. *Burleigh*, No. 96-7907, 1998 WL 433001, *1 (2d Cir. Apr. 22, 1998). The Eleventh Circuit, too, recently expressed apparent sympathy with this approach. *Mason*, 307 F.3d at 1276 n.7 (citing *Jarvis* and suggesting but not deciding that the defendant may need to alert the court to the possibility of potential inconsistency *before* the case is submitted to the jury).

The Third Circuit, however, has expressly rejected the contention that the failure to object under Rule 51 to jury instructions and interrogatories precludes a later argument that the verdict contains inconsistencies. See *Loughman*, 6 F.3d at 103 ("The question before us is not whether there was error in the instructions or the interrogatories, but the legal effect of the jury's answers, and, more specifically, whether the jury's answers can be reconciled."). In the Third Circuit's view, the issue of waiver is governed by the party's conduct *after* the inconsistent verdict is returned. *Ibid.* The Sixth Circuit has reached a similar conclusion in an unpublished decision. See *Holloway* v. *McIntyre*, Nos. 86-1001, 86-1898, 1988 WL 7961, at *5 (6th Cir. Feb. 4, 1988) (rejecting argument that defendant waived objection to verdict inconsistency by failing to object to

jury charge; "We do not believe a party should be held to an onerous inconsistency merely because he was not prescient of upcoming events.").

The Third Circuit's view is reflected implicitly in decisions by many other courts, which have addressed the merits of inconsistencies within verdict forms that frame alternative liability theories without suggesting that the submission of the case to the jury on those theories was erroneous or that the objecting party should have challenged it. See, *e.g.*, *Oja* v. *Howmedica, Inc.*, 111 F.3d 782, 791-792 (10th Cir. 1997) (entry of judgment for plaintiff on negligence was plain error in light of jury verdict for manufacturer on strict liability); *Bradley* v. *General Motors Corp.*, No. 96-8073, 1997 WL 354721, at *3 (10th Cir. June 26, 1997) ("when several causes of action are identical and defended on the same ground, a verdict for the plaintiff on one cause of action and for the defendant on another is inconsistent") (internal quotation marks and citation omitted); *Tipton* v. *Michelin Tire Co.*, 101 F.3d 1145, 1150-1151 (6th Cir. 1996) (granting judgment for defendant after concluding that jury findings that the defendant was negligent but not strictly liable were inconsistent); *Romero* v. *International Harvester Co.*, 979 F.2d 1444, 1454 (10th Cir. 1992) (granting judgment to defendant after concluding that the jury's findings for defendant on strict liability and negligent design theories precluded finding for plaintiff on negligent failure to retrofit theory); *Witt* v. *Norfe, Inc.*, 725 F.2d 1277, 1279-1280 (11th Cir. 1984) (granting new trial after concluding that the jury's findings for defendant on implied warranty and strict liability theories were inconsistent with its finding that the defendant was negligent); *Gumbs* v. *International Harvester, Inc.*, 718 F.2d 88, 94-95 (3d Cir. 1983) (ordering new trial because verdicts on strict liability and breach of implied warranty theories were inconsistent); *Werner* v. *Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980) (concluding that the jury's finding for the defendant on strict liability meant that its finding for the plaintiff on negligence was "obviously inconsistent and cannot stand").

2. The waiver rule imposed by the decision below also is in tension with generally accepted trial practice. It is widely recognized that submitting a case to the jury on multiple legal grounds may offer plaintiffs some tactical advantages. See John E. Theuman, *Products Liability: Inconsistency of Verdicts on Separate Theories of Negligence, Breach of Warranty, or Strict Liability*, 41 A.L.R. 4th 9 (1985) (negligence, strict liability, and implied warranty theories "are not mutually exclusive, and, since each has its advantages and disadvantages for the plaintiff, a products liability action will frequently allege all of them as alternative grounds for recovery") (footnote omitted). At the same time, it is understood that doing so creates the risk of inconsistent verdicts that may result in a new trial or the entry of judgment for the defendant. For example, a treatise on products liability observes:

> Although alleging alternative theories of liability gives the plaintiff a fall-back position should proof on an element of one theory prove insufficient, it also poses a potential hazard, in that a jury asked to make separate verdicts or findings on each theory may hold for the defendant on one theory while holding for the plaintiff on another; if these verdicts cannot be reconciled, the plaintiffs' victory may be thrown out by the trial or an appellate court.

AMERICAN LAW OF PRODUCTS LIABILITY 3D § 56.19 (2003). Despite these risks, submitting a case on multiple theories generally is viewed as the plaintiffs' prerogative.

That certainly was true in this case. The First Circuit has expressly recognized that, under New Hampshire law, plaintiffs *may* submit multiple theories to the jury. See *Babcock*, 299 F.3d at 65 (although the practice is "frowned upon," "New Hampshire law does not prohibit submitting both negligence and strict liability claims to the jury"); see also App., *infra*, 8a (citing *Babcock*); *Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H. 1978). Indeed, the New Hampshire Supreme Court had reiterated *in this very case*, only a few months before trial, that plaintiffs were entitled to proceed on both theories.

Trull, 761 A.2d at 481. At the same time, the New Hampshire Supreme Court has observed that, in certain situations, "[h]aving found for the defendant on strict liability, a jury [may] not find for the plaintiffs on * * * negligence * * * except by disregarding their instructions." *Greenland*, 347 A.2d at 163. That Court also has pointedly stated:

> While we note that both counts are permitted, we do not recommend to plaintiffs that counts in both negligence and strict liability against the same defendant be submitted to the jury because of the confusion that is created.

Ibid.

Accordingly, *plaintiffs* assumed the risk that their decision to proceed on both counts would result in an untenable verdict. On the other hand, once the district court denied its motions during trial for judgment with respect to negligence on the basis that plaintiffs had not established any design defect (R. 1277-1283, 2358-2360), *Volkswagen* had no grounds to object to the submission of the case on both theories. Nor did Volkswagen have any reason to anticipate the inconsistency. As noted above, the jury was instructed that it could not rule against Volkswagen on *any* theory unless it found the presence of a design defect. Had the jury followed the instructions, it could not have answered "yes" to question 3 after answering "no" to question 1. In finding that defendants were negligent despite having concluded that plaintiffs did *not* prove the existence of a defect, the jury directly disobeyed that instruction.[7] "The

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[7] Moreover, the verdicts here contained more than an *implicit* inconsistency between the jury's findings on two legal theories – which has been deemed sufficient in many cases to preclude entry of judgment for the plaintiff. See, *e.g.*, *Tipton*, 101 F.3d at 1150 (granting judgment to defendant on plaintiff's negligence claim because "[i]n answering 'no' to the interrogatory on strict liability, the jury necessarily found that Tipton's tire was *not* in a 'defective condition'"); *Witt*, 725 F.2d 1277 (granting new trial because the

theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them." *City of L.A.* v. *Heller*, 475 U.S. 796, 798 (1986) (per curiam). Given that presumption, the court of appeals' holding that Volkswagen waived its objection to the jury's inconsistent findings by acceding to the instructions and the verdict form is entirely unjustified.

The fact that the verdict form (which was designed by the district court) invited the jury to respond to question 3 after answering "no" to question 1 should not alter this conclusion. True, it might have been preferable if the form had instructed the jury to end its deliberations if it answered question 1 in the negative. But the absence of that instruction did not "invite" the inconsistency: had the jury obeyed the court's *other* instructions, a "no" answer to question 1 would necessarily have been followed by a "no" answer to question 3. See App., *infra*, 41a. Volkswagen's failure to predict that the jury would disregard the instructions should not be deemed a waiver of its right to challenge a judgment that ignores the jury's findings.

Indeed, plaintiffs, more so than Volkswagen, should have been alert to the possibility that the verdict forms created the possibility of inconsistency. As mentioned above, the New Hampshire Supreme Court has warned *plaintiffs* of just this outcome. *Thibault*, 385 A.2d at 843. Because the inconsistency was made possible by plaintiffs' trial strategy – and either side might have brought the issue to the district court's attention – it is unfair to allow plaintiffs "to prevail merely by remaining silent" (*Los Angeles Nut House*, 825 F.2d at 1354), in derogation of state law disallowing such a judgment. See also *Bradley*, 1997 WL 354721, at *4 ("if the plaintiffs had elected

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jury's implicit finding that product was not defective undermined finding that defendant was negligent). The jury made an *express* factual finding that the plaintiff had not proved "by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions[.]" App., *infra*, 34a.

to proceed only on their theory of negligence, no inconsistency would exist with the findings of comparative fault").

Finally, it must be noted that the right to have judgment entered in accordance with the jury's findings implicates the Seventh Amendment's right to trial by jury. See *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. at 359. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 756 (1970). The failure to object to parenthetical directions on a verdict form drafted by the court surely does not satisfy this standard.

3. In ruling that defendants may not challenge verdict inconsistencies unless they first predict and try to prevent them, the First Circuit has strayed far from the usual course. In the vast majority of cases, courts have determined whether a party has preserved its objections to inconsistencies by evaluating its conduct *after* the inconsistent verdicts are returned. The Third Circuit has stated expressly that this is the correct approach. So far as we are aware, only the First and Second Circuits have adopted the anomalous rule reflected in the decision below, under which the right to challenge a verdict inconsistency frequently is waived before the jury deliberations even begin.

The divergence among the courts of appeals regarding this frequently recurring issue will engender enormous confusion and inefficiency in the federal courts. To ensure that their rights are preserved, defendants will have to raise and press objections to a plaintiff's submission of alternative liability theories, even when state law unequivocally provides that the plaintiff may proceed in this fashion. In such circumstances, the required objections either will be pointless or will lead the district court into error. Federal procedural rules should not be construed to require such counterproductive undertakings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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MAY 2003

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 01-2010

NATHANIEL TRULL, PPA DAVID TRULL AND DAVID TRULL, ADMINISTRATOR OF THE ESTATE OF BENJAMIN TRULL, Plaintiffs, Appellees,

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN, AG, Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Joseph A. DiClerico, Jr., *U.S. District Judge*]

Before

Lipez, *Circuit Judge*, Campbell and Bownes, *Senior Circuit Judges*.

Howard B. Meyers with whom *Carolyn Cole Durst*, *Myers Associates, PLLC*, *Michael Hoenig*, *Roger Arentzen*, *Miriam Skolnik*, and *Herzfeld & Rubin, P.C.* were on brief for appellants.

Alan L. Cantor with whom *Edward M. Swartz*, *David P. Angueira*, and *Swartz & Swartz* were on brief for appellees.

November 14, 2002

BOWNES, *Senior Circuit Judge*. This appeal arises out of an action brought in the district court arising from a collision on February 19, 1991, in Conway, New Hampshire, between a 1986 Volkswagen Vanagon and a 1979 AMC Concorde. The Vanagon was driven by David Trull. His two sons Benjamin and Nathaniel were seated in the rear passenger seat. Benjamin was killed; his brother, Nathaniel, received serious injuries. The father, David Trull, brought this action on behalf of Benjamin's estate and Nathaniel, who was a minor at the time the complaint was brought.

The plaintiffs asserted claims in strict liability and negligence against both defendants-appellants Volkswagen of America, Inc. and Volkswagen, AG (collectively "VW"). The evidence was essentially the same as to both theories of liability. The district court instructed the jury: "The plaintiffs have asserted strict product liability and negligence claims against the defendant. However, they need not prove both claims to recover. They will be entitled to recover if they prove one or the other of these claims."

Plaintiffs' claim of liability was that the 1986 Vanagon had been defectively designed and was unreasonably dangerous because it was not equipped with lap/shoulder belts in each of the rear seats. The only passenger body restraints were lap belts. The jury, in answer to specific questions, found that VW was not liable in strict liability but was liable in negligence it awarded Nathaniel Trull the sum of $8,917,335.27. It awarded the estate of Benjamin Trull $1,290,980.70.

This is the second time that this case has been before us. In the first trial VW prevailed. The plaintiffs appealed on the ground that the trial judge erred in putting the burden of proof as to enhancement of injuries on them. We certified that issue to the New Hampshire Supreme Court. *Trull* v. *Volkswagen of*

Am., 187 F.3d 88 (1st Cir. 1999). The Supreme Court of New Hampshire ruled that in a damages enhancement situation the burden of proof falls on the defendant. *Trull* v. *Volkswagen of Am., Inc.*, 761 A.2d 477 (N.H. 2000). We remanded to the district court for a new trial. *Trull* v. *Volkswagen of Am., Inc.*, 229 F.3d 343 (1st Cir. 2000). We affirm the judgment below.

I. THE VERDICTS

There are four issues posited for review. Our discussion of the issues does not follow the order in which they are argued in VW's brief. We start with VW's contention that the verdicts were inconsistent, that the negligence finding of liability was nullified by the jury finding that VW was not liable on the claim of strict liability and therefore there should be either a judgment for VW or a new trial.

The case was tried from the start by plaintiffs on the theory that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts on the rear seats and this omission caused the death of Benjamin Trull and seriously injured Nathaniel Trull. In its jury instructions the district court explained separately the elements of strict liability and negligence. No objection was made by VW to the verdict forms handed to the jury or the risk of inconsistent verdicts until after the clerk had been instructed by the court "to enter judgment in accordance with the special findings of the jury" and the jury discharged.

VW implies in its brief at page 15 that it did not have the time to make any objections or that the district court speeded up the post-verdict process to thwart any objections. There is nothing in the record to substantiate this implication. Labeling the post-verdict session a "truncated ten-minute session" does not change the facts. VW's attorneys may have been shocked

by the verdict but there is nothing in the record to indicate that VW wished to object to anything.

The record shows that VW did not object to the verdict forms at any time prior to their submission to the jury. The record further establishes that there were no objections to the jury instructions at any time either prior to or after their delivery. This means that VW has waived its right to object to any foreseeable combination of proper responses to the questions posed on the verdict forms. It also means that VW was satisfied with the jury instructions until the jury returned the verdicts.

If we assume arguendo the verdicts were inconsistent, and as to this we have serious doubts, there can be no doubt that VW's failure to follow the applicable Rule of Civil Procedure bars its appeal. It is clear to us that Federal Rule of Civil Procedure 49(b) applies to the verdict forms, not Rule 49(a) as VW asserts. Rule 49(a) states: "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Here, for example, a special verdict form could have included questions such as whether the brothers were wearing lap belts at the time of the collision. When such a form is used, the jury makes only findings of fact; it is up to the court to apply the law. *Babcock* v. *Gen. Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002); *see* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2503 (2d ed. 1994). There can be little doubt that this was not the type of verdict form used in this case.

The verdict form in this case fell within the ambit of Rule 49(b) which addresses general verdicts and states: "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict."

Although there were no written interrogatories submitted to the jury, it is clear that the two liability questions submitted to the jury were general verdict forms under Rule 49(b).

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions?

No
(Yes or No)

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

Yes
(Yes or No)

The last sentence of Rule 49(b) specifically discusses inconsistent answers to questions submitted to the jury: "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

We have held that under Rule 49(b), objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged. *E.g., Babcock*, 299 F.3d at 63; *Merchant* v. *Ruhle*, 740 F.2d 86, 89 (1st Cir. 1984); *Skillin* v. *Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981). We rule that VW forfeited its objection to the alleged inconsistency by failing to object at any time prior to the jury's discharge.

The instructions made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence. The verdict forms had been examined by counsel for VW before they were submitted. VW's reason for its failure to object at the critical times was that the verdicts did not become inconsistent until after the jury had completed them. But we cannot accept this; to do so would countenance "agreeable acquiescence to perceivable error as a weapon of appellate advocacy." *McIsaac* v. *Didriksen Fishing Corp.*, 809 F.2d 129, 134 (1st Cir. 1987) (quoting *Merchant*, 740 F.2d at 88-89); *see also Babcock*, 299 F.3d at 64. By failing to timely object to the jury instructions, VW thereby waived any objection it may have had. *See* Fed. R. Civ. P. 51. Moreover, that failure to object greatly limits the scope of subsequent review. *See* Fed. R. Civ. P. 61.

Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part: "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 51 has been stringently enforced to the extent that a district court judge cannot waive it even with the acquiescence of counsel. *Poulin* v. *Greer*, 18 F.3d 979, 982 (1st Cir. 1994); *Smith* v. *Mass. Inst. of Tech.*, 877 F.2d 1106, 1109 (1st Cir. 1989); *McGrath* v. *Spirito*, 733 F.2d 967, 969 (1st Cir. 1984) ("[Rule 51] is binding on both the court and attorneys and neither can circumvent it."). And, of critical importance here, a failure to object as required by Rule 51 deprives the non-objecting party of review under Rule 61, either before the trial court on a post-trial motion or on appeal. *Babcock*, 299 F.3d at 64; *Scarfo* v. *Cabletron Sys., Inc.*, 54 F.3d 931, 941 (1st Cir. 1995).

We quote extensively from our prior opinion in *Babcock*, 299 F.3d at 64-65:

> The only exception to nullification of appellate issues for failure to follow Rule 51 is the plain error doctrine. *Smith* v. *Kmart Corp.*, 177 F.3d 19, 28-29 (1st Cir. 1999). Reversal under that doctrine requires that (1) there be error; (2) the error was "plain" (i.e. obvious and clear under current law); (3) the error affected substantial rights; and (4) the error threatened a miscarriage of justice. *Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8, 15 (1st Cir. 1999). We have applied the plain error doctrine "stringently" in civil cases. *Id.* Accordingly, we will grant relief on an issue that has been forfeited on appeal only "to prevent a clear miscarriage of justice . . . or where the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Romano* v. *U-Haul Int'l*, 233 F.3d 655, 664 (1st Cir. 2000) (citations and internal quotation marks omitted). We might find plain error where "'the failure to raise the claim below deprived the reviewing court of helpful factfinding; . . the issue is one of constitutional magnitude; . . . the omitted argument is highly persuasive; . . . the opponent would suffer special prejudice; . . . and, perhaps most importantly, . . . the issue is of great importance to the public.'" *Id.* (quoting *Play Time, Inc.* v. *LDDS Metromedia Communications, Inc.*, 123 F.3d 23, 30 n.8 (1st Cir. 1997) (alterations in original).
>
> We examine New Hampshire law to determine whether there was plain error below. If New Hampshire law forbade combining a count in negligence with a count in strict liability in a tort case, the plain error doctrine might be applicable. But New Hampshire law does not prohibit submitting both negligence and strict liability claims to the jury. *See, e.g., Cyr* v. *J.I Case Co.*, 652 A.2d 685, 693 (N.H.

> 1995); *Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H.1978); *Greenland* v. *Ford Motor Co., Inc.*, 347 A.2d 159, 163 (N.H. 1975). The most that can be said is that submission of both claims is frowned upon. *Thibault,* 395 A.2d at 849 ("While . . . both counts are permitted, we do not recommend to plaintiffs that counts in both negligence and strict liability be submitted to the jury because of the confusion which is created"); *see also Greenland*, 347 A.2d at 163. We will not create a general rule of prohibition in light of the New Hampshire Supreme Court's reluctance to do so. We rule that it was not plain error to submit counts in both negligence and strict liability to the jury.

For the reasons set forth in *Babcock* we find there was no plain error here.

The only question on the issue of claimed inconsistent verdicts that does not admit of an easy solution is whether the verdicts were inconsistent. The district court held that they were not, stating:

> Taking into account the New Hampshire law applicable to each claim and the evidence that was adduced at trial, the court finds that the jury's answers to special verdict questions one and three propounded in each of the plaintiffs' cases were not inconsistent. The jury evaluated the evidence in light of each claim and answered the special verdict questions as instructed. The defendant's inconsistency claim must fail on its merits.

Our review of the district court's ruling is *de novo* because this is a pure question of law. *See Gamma Audio & Video, Inc.* v. *Ean-Chea*, 11 F.3d 1106, 1114 (1st Cir. 1993).

We note first that there is a distinct difference in the wording of the two questions. The question on strict liability stated:

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions?

The question was limited only to defective design. The question on negligence, however, had more flesh to it:

Negligence

3. Do you find by a preponderance of the evidence that the defendant was *negligent in designing and/or testing the 1986 Vanagon* because it lacked lap/shoulder belts in the rear seating positions? (Emphasis added.)

Under the wording of the negligence question the jury could have found Volkswagen liable on one or more of the following grounds: because its design of the rear seat restraint mechanism did not include lap/shoulder belts; there was negligent testing by VW that did not disclose that lap/shoulder belts were needed to restrain the torso of a passenger in the rear seat from being thrown violently forward in an accident; or that VW's negligence encompassed both design and testing.

VW has cited cases from other jurisdictions that have ruled as a matter of law that verdicts based on a finding of no strict liability in a defective design case would nullify a liability finding of negligent design. As we stated in *Babcock*, however,

> We need not determine whether that proposition is correct — it is enough to conclude, as we do, that New Hampshire law is not so clear on the question that it was plain error for the district court to enter judgment on the jury's verdict.

299 F. 3d at 65. It is clear that under New Hampshire tort law, both strict liability and negligence questions can be submitted to the jury. *See Thibault*, 395 A.2d at 849; *Greenland*, 347

A.2d at 163. Moreover, as noted above, the negligence question submitted to the jury referenced "negligent design *and/or testing*" as possible grounds for a finding of liability.

Therefore, in the context of this case, we hold that it was not plain error for the district court to enter judgment upon verdicts indicating liability for negligence but not for strict liability. The jury was instructed properly on the legal elements of strict liability and negligence. The jury was also instructed that both liability questions were to be answered. It is obvious that the jury understood the instructions and its duty. It found no liability on strict liability and did not answer the damages part of the question. No questions evincing confusion or ignorance were asked of the court by the jury. It is apparent that the jury understood that the focus of strict liability is on whether the design itself is unreasonably dangerous whereas in a negligence case the focus is on the conduct of the manufacturer, which brings us to the next issue, the evidence of VW's negligence.

II. EVIDENCE OF NEGLIGENCE

VW claims that plaintiff failed "to adduce sufficient evidence to establish negligence." VW Br. at 17. It first argues that the standard of review is de novo. This position is contrary to the applicable law. VW filed a post-trial motion for a remittitur or, in the alternative, for a new trial. It also filed a motion for judgment as a matter of law or a new trial. It is these motions that determine the standard of review.

In reviewing the denial of a motion for judgment as a matter of law we must evaluate the evidence and inferences adduced therefrom in the light most favorable to the plaintiff. *Raymond* v. *Raymond Corp.*, 938 F. 2d 1518, 1521 (1st Cir. 1991); *Austin* v. *Lincoln Equip. Assocs., Inc.*, 888 F.2d 934, 937 (1st Cir. 1989). Such a motion should be granted by the district court only if, as a matter of law, the evidence would lead a reasonable

jury to only one conclusion that the defendant was entitled to judgment. *Hendricks & Assocs., Inc.* v. *Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991). And the reviewing court may only reverse a trial judge's ruling denying a motion for a new trial if the district court's decision is so clearly mistaken as to constitute a miscarriage of justice. *Raymond*, 938 F.2d at 1522; *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 558 (1st Cir. 1989).

With this standard of review as our guide we start our analysis. Both parties agree that the applicable standard of care is that of a reasonably prudent automobile manufacturer. We first note that the front seats of the Vanagon were equipped with lap and shoulder belts. This means that this type of body restraint was known and available to VW. There was evidence by one of plaintiff's experts as follows: "There was sufficient evidence before 1986 [the year of the Vanagon's manufacture] to show that lap belts alone just can't do the job — to protect a person, you need a lap and shoulder belt."

The results and evaluation of tests performed by VW relative to the safety afforded rear seat passengers equipped with lap belts only, and those with both lap and shoulder belts, were exhibits in the case. The tests were performed by VW on April 27, 1981, which was five years prior to the manufacture of the Vanagon in which Benjamin and Nathaniel Trull were passengers. The pertinent conclusions that VW made were as follows:

Limited protection by lap belt

> The occupant restrained with lap belt was displaced forward due to elongation of the belt. The rotational movement of the upper torso about the hip point enables head contact with the back rest in front of it.

1. *Evaluation regarding injury risk*

Three-point belt

The occupant restrained with three-point belt is well protected in a frontal crash. No contact with the steering wheel, instrument panel, transverse beam, etc. (photo 5 and 6).

Lap belt

Lap-belt restrained vehicle occupants are subject to a high degree of head and cervical vertebrae injuries. The lap belt enables a rotational motion about the hip point. (Photo 7, 8 and 9).

There was testimony by one of plaintiff's expert witnesses (D'Aulerio) that the use of a shoulder belt would have eliminated the head injuries to Nathaniel and Benjamin. The witness explained to the jury that the lap belt alone acted as a lever so that as the torso and head were bent they were accelerated forward and inclined downward at the moment of impact. The lap belt, therefore, according to the expert, was partially responsible for the head injuries received by both brothers.

Another of plaintiffs' experts, Dr. Anthony Sances, had a master's degree in physics and a Ph.D. in biomedical engineering. Dr. Sances had considerable experience in determining the cause and extent of injuries resulting from automobile collisions; he had been involved in over a thousand cases. It was his opinion that there would have been no head injuries to either Benjamin or Nathaniel if they had been wearing shoulder belts.

We summarize other record evidence of negligence:

It was known since the 1950's in the automotive industry that shoulder belts restrain forward movement of occupants while lap belts do not;

It was known for a long time before 1986 that lap belts alone did not offer adequate protection to occupants and that lap-shoulder belts were needed to do the job;

In 1980, NHTSA sent a letter to all motor vehicle manufacturers, including Volkswagen in which it stated, "rear seat three-point belts should be offered for additional protection to rear seat occupants. They have been offered by Volvo, Mercedes and a few others for many years as standard equipment";

In 1986, Volkswagen sold the Vanagon in four foreign countries with rear shoulder harnesses as standard equipment;

In 1986, Volkswagen sold four out of five of its sedan type vehicles in the United States with rear lap shoulder belts as standard equipment;

Since the early 1970's, all Vanagons had anchor points which would have allowed for installation of lap-shoulder belts in the rear seats;

Volkswagen offered the same rear seat shoulder harness as optional equipment for the 1986 Vanagon sold in the United States which was standard equipment in other countries.

Based on our examination of the record, we have no difficulty ruling that there was a plethora of evidence from which the jury could find that VW was negligent in not equipping the Vanagon sold to plaintiff with shoulder belts on the rear passenger seats and this negligence was the proximate

cause of the enhanced injuries suffered by Nathaniel and Benjamin in the collision.

III. THE DAMAGES AWARDED NATHANIEL TRULL

VW contends that the award of $8,917,335.27 "is wildly excessive, justifying substantial reduction." VW Br. at 48. Our standard of review of damages is abuse of discretion:

> We review the denial of a motion for a remittitur for abuse of discretion. *See Anthony*, 17 F.3d. at 493; *McDonald* v. *Federal Laboratories, Inc.*, 724 F.2d 243, 246 (1st Cir. 1984). We will find an abuse of discretion only if the jury's verdict exceeds "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Milone* v. *Moceri Family, Inc.*, 847 F.2d 35, 36 (1st Cir. 1988) (quoting *Segal* v. *Gilbert Color Systems, Inc.*, 746 F.2d 78, 81 (1st Cir. 1984)). We have noted that "the obstacles which stand in the path of" such claims of excessiveness "are formidable ones." *Wagenmann* v. *Adams*, 829 F.2d 196, 215 (1st Cir. 1987). Translating legal damage into money damages is a matter "peculiarly within a jury's ken," especially in cases involving intangible, non-economic losses. *Id.*; *see also Correa* v. *Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995) ("An appellate court's normal disinclination to second-guess a jury's evaluation of the proper amount of damages is magnified where, as here, the damages entail a monetary valuation of intangible losses, and the trial judge, having seen and heard the witnesses at first hand, accepts the jury's appraisal."), *cert. denied* 517 U.S. 1136 (1996). Viewing the evidence in the light most favorable to the verdict, the jury's assessment of damages will not be disturbed unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so

> high that it would be a denial of justice to permit it to stand." *Id.* (quoting *Segal*, 746 F.2d at 80-81) (internal quotation marks omitted).

Smith v. *Kmart Corp.*, 177 F.3d 19, 29-30 (1st Cir. 1999).

VW points to a number of mental, physical, and psychological problems with which Nathaniel was afflicted prior to the accident. One of the bedrock foundations of tort law is that the defendant takes the plaintiff as it finds him. *See Fiquerora-Torres* v. *Toledo-Davilla*, 232 F.3d 270, 275 (1st Cir. 2000); *Dotty* v. *Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43 (5th ed. 1984). VW points out that there was conflicting evidence on how seriously Nathaniel was injured. From our vantage point we focus on the evidence favorable to the verdict. *See Smith*, 177 F.3d at 30.

VW claims that based on unrefuted medical evidence Nathaniel did not suffer a brain injury in the accident. To put it in VW's words: "In the crash he sustained a head injury consisting of a skull fracture and *epidural hematoma without brain damage and sequelae*." VW Br. at 49 (emphasis in original). But on cross-examination, VW's expert medical witness, Dr. Mendelsohn, testified that Nathaniel Trull did, in fact sustain a change in his condition, making him worse.

There was competent evidence that Nathaniel sustained a depressed skull fracture causing blood to form inside the brain that had to be drained away by an operation called a craniotomy.

There was evidence by a neuropsychologist and a clinical psychologist both of whom had treated Nathaniel before and after the accident. The opinion of these experts was that Nathaniel's head trauma exacerbated his pre-existing condition

so that he is now unable to live independently and will have to live under supervised structured conditions for the rest of his life.

There was evidence by a medical economist that the life expectancy of Nathaniel was 58.1 years and that the economic loss due to the injury was approximately $5.3 million. As the district court pointed out in its order denying VW's motion for a remittitur, VW did not submit any economic evidence. The figure of $5.3 million did not include any amount for pain and suffering or other hedonic damages.

The jury was properly instructed that Nathaniel was entitled to recover for past and future, pain and suffering, mental anguish and disability.

We rule that the district court did not abuse its discretion in denying the motion for a remittitur.

IV. THE EXCLUSION OF TEST REPORTS IN THE GERMAN LANGUAGE

This issue need not detain us long. VW offered as exhibits test reports in the German language. Plaintiff objected and the court informed VW that the reports would not be admitted unless they were translated into English. This was not done. The district court did not abuse its discretion in excluding the documents.

The judgment below is affirmed. Costs on appeal awarded to plaintiff.

~ Concurring Opinion Follows ~

CAMPBELL, *Senior Circuit Judge*, concurring. I concur in the judgment. I write separately because I do not understand why my colleagues, after finding that VW did not preserve the issue of verdict inconsistency, have gone on to discuss that

issue to the extent they do, even suggesting a likely consistency between the jury's two verdicts. Whether or not the jury's responses on defective design and negligence were inconsistent, VW's failure to preserve the inconsistency issue, and the absence of plain error, makes the inconsistency issue irrelevant. New Hampshire law is so clouded as to make it undesirable for a federal appeals court to speculate unnecessarily in ways that might later be seen as pronouncements on one or another facet of the inconsistency issue.

I fully agree with my colleagues that by failing to object at the proper time to the court's relevant instructions and jury forms, and by failing to object on inconsistency grounds after the verdict was read and before the jury was dismissed, VW waived any claim of verdict inconsistency. *See, e.g., Howard* v. *Antilla*, 294 F.3d. 255, 251 (1st Cir. 2002); *Bonilla* v. *Yamaha Motors Corp.*, 955 F.2d 150, 155-56 (1st Cir. 1992). And I further agree there was no plain error. The latter is not simply a question of whether the court acted correctly under New Hampshire law. Even a clear and obvious error of state law would not, by itself, amount to plain error. The error would not be "plain", so as to excuse VW's failure to object, unless the error had also resulted in a miscarriage of justice. *See, e.g., United States* v. *Olano*, 507 U.S. 725, 733 (1993); *Chestnut* v. *Lowell*, 30S F.3d 18, 20 (1st Cir. 2002). Here I can see no miscarriage of justice regardless of whether or not the jury findings on defective design and negligence were inconsistent. It is therefore entirely unnecessary for this court to suggest there was in fact consistency, in particular because the negligence question submitted to the jury referenced negligent testing as well as negligent design. Reconciling the finding of no defective design with a finding of negligent testing, on this record, is not much easier than reconciling it with a finding of negligent design. To be sure, New Hampshire apparently

permits cases to be submitted simultaneously on defective design and negligence theories, but this does not determine what should be done if the jury's results seem contradictory in a particular case.

The overriding point here is simply that VW did not preserve the inconsistency issue. That should end the matter. While the jury's logic with respect to its answers on the two counts is indeed debatable, there is no obvious injustice to entering judgment on the verdicts, as the court did. The jury's intentions were entirely clear — it found liability predicated on negligence, and there was ample evidence to support such a finding. Whatever the inconsistency of its negative finding on defective design, that finding (if inconsistent) is most reasonably seen as the product of confusion as to the elements of the defective design count rather than as casting doubt on the validity of the jury's resolution of the negligence count. There is nothing fundamentally unjust about entering judgment on both counts. If VW wanted to argue the inconsistency issue, it needed to preserve its rights.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

David Trull as Administrator
of the Estate of Benjamin Trull
and as Father and Next Friend
of Nathaniel Trull

v. Civil No. 94-015-JD

Volkswagen of America, Inc.
Volkswagen, A.G.

ORDER

The defendants have filed a motion for an order of remittitur or, in the alternative, an order for a new trial (document no. 225) and a motion for judgment as a matter of law or, in the alternative, a new trial (document no. 226) to which the plaintiffs have filed objections (documents no. 228, 229).

The court will consider the two motions together.

The defendants (referred to collectively as the defendant) claim that the verdicts were inconsistent because the jury, in response to the special verdict questions propounded to it, found on the one hand that under the strict liability claim the vehicle in question was not defectively designed (Question 1 on strict liability) and on the other hand found that under the negligence claim the defendant was negligent in designing and/or testing the vehicle (Question 3 on negligence). This claim is without merit for several reasons.

The New Hampshire Supreme Court in *Trull v. Volkswagen of America, Inc.*, 761 A.2d 477 (2000), in response to a certification request from the United States Court of Appeals

for the First Circuit (*see Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999)), set forth the New Hampshire law on liability for defective design in a crashworthiness case. The court stated, among other things, that "A strict liability action based upon a theory of defective design may be joined with an action grounded in negligence." *Trull*, 761 A.2d at 481 (citing *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 807, 395 A.2d 843, 846 (1978)). This principle of New Hampshire law, which has been recognized since 1978, was relied upon by the plaintiffs in this case who claimed liability for a design defect based on two legal theories, strict liability and negligence. The court instructed the jury in accordance with New Hampshire law on the legal principles that applied to each claim and made it clear that the plaintiffs need not prove both claims in order to recover but could recover if they met their burden of proof with respect to either claim.

Taking into account the New Hampshire law applicable to each claim and the evidence that was adduced at trial, the court finds that the jury's answers to special verdict questions one and three propounded in each of the plaintiffs' cases were not inconsistent. The jury evaluated the evidence in light of each claim and answered the special verdict questions as instructed.

The defendant's inconsistency claim must fail on its merits. However, assuming there were merit to the claim, there is, in the opinion of the court, a procedural hurdle that the defendant has failed to overcome in order to raise such a claim at this time.

The court presented counsel with a draft of proposed jury instructions and special verdict forms. The instructions were quite similar to those given in the first trial with the principle changes being those required as a result of the New Hampshire Supreme Court's decision in *Trull*, *supra*, relating to the

allocation of the burden of proof in a crashworthiness case. Counsel had an opportunity to review the draft instructions and special verdict forms with the court during a charging conference and then again when the final draft was prepared. After the charge was delivered to the jury, the court invited counsel to the bench to present any objections they might have to the charge. Defense counsel, while raising several objections, did not object to the appropriateness of instructing the jury on the two theories of liability or to the manner in which those instructions presented the theories, and did not raise any issue concerning the possibility of inconsistency either with respect to the instructions or the special verdict forms. When the jury returned its answers to the questions on the special verdict forms, defendant's counsel did not raise any issue concerning inconsistency, something which could have been readily accomplished with a simple request to approach the bench. The jury was then discharged.

This case has been through two trials. If the issue of inconsistent verdicts is as significant as the defendant contends, then it is one the defendant should have anticipated and should have raised with the court earlier in the proceedings when there were numerous opportunities to do so. However, it was not raised during the charging conferences for either trial, by way of objection immediately after the jury charge was given in either trial, or by way of objection immediately following the jury's verdicts in the second trial. It was in the second trial that the issue was raised for the first time in a motion filed a number of days after the verdicts were returned and the jury had been discharged.

The defendant was under an obligation to raise the issue of inconsistency with respect to the special verdict forms after the jury was charged and before deliberations began. As previously noted, since this issue is one of major concern to the defendant,

it should have been anticipated by the defendant and raised in a timely manner. As the record reflects, the defendant failed to do so. Fed. R. Civ. P. 51 states:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

This rule is applicable to special questions as well as jury instructions. *Anderson v. Cryovac*, 862 F.2d 910, 918 (1st Cir. 1988). As the court noted in *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 940 (1st Cir. 1995), "[t]he rule has been vigorously enforced in this circuit." The court in *Scarfo* provided an excellent explanation of the rationale for rigorous enforcement of the principles embodied in the rule.

> A rigorously enforced timeliness principle is fundamental both to fair process and to avoiding adverse effect on substantial rights of the parties. Under such a principle, a clearly defined opportunity to present a contention must be exercised at a precisely defined time in the trial proceedings. It is a now-or-never opportunity that a party must, at that precise time, use or lose. *Cf. Arenson v. Southern Univ. Law Ctr.*, 43 F.3d 194, 198 (5th Cir. 1995) (invoking the phrase "use it or lose it" in relation to timeliness of motions for judgment as a matter of law and, alternatively, for a conditional new trial).
>
> One of these contexts is the preparation of the charge to the jury, including the specific phrasing of any questions submitted to the jury. The moment immediately before the jury retires to deliberate is a time when hard choices, with significant consequences, must be made by the parties and by the trial judge. Interests of fairness to each party weigh heavily in favor of requiring that every other party, at this

> critical moment, use or lose any right to assert that the trial court should change in some way the court's instructions to the jury on the substantive law governing the case. It is awkward to change instructions after the jury has commenced deliberating, and as a practical matter, once the jury has been disbanded after returning a verdict, it can never be called back to receive the corrected charge that the trial court might have given if asked at the right time to do so.
>
> Failure to exercise the right to object to the court's charge at the critical moment prescribed by Rule 51 results in the loss of an opportunity to review under a standard no more burdensome for the appellant than the harmless error standard. Unless the reviewing court concludes that the charge has caused a miscarriage of justice or has undermined the integrity of the judicial process, the charge is treated as having an effect closely analogous to law-of-the-case doctrine, and for similar reasons of policy and fairness of process.

Id. at 940.

The defendant was also under an obligation to raise the issue of inconsistent verdicts with the court immediately following the return of the verdicts and before the jury was discharged so that the court, if necessary, could have taken appropriate steps to cure the alleged problem. Just as counsel, following the announcement of a verdict, may immediately request that the jury be polled, so could counsel in this case have immediately requested the opportunity to approach the bench where the inconsistency issue could have been raised with the court. The court would then have been in a position to take a recess to allow counsel for the parties to address the issue, and, if necessary and appropriate, to undertake measures through

additional instructions and special questions to have the jury clarify any inconsistency. As the record reflects, no such request was made. The court, perceiving no inconsistency, was not under an obligation to raise the issue on the defendant's behalf. In *Phav v. Trueblood Inc.*, 915 F. 2d 764, 769 (1st Cir. 1990), the court stated:

> As we have repeatedly said, the use of special interrogatories puts the parties on notice that there might be an inconsistent verdict. *See Austin v. Lincoln Equip. Assoc., Inc.*, 888 F.2d 934, 939 (1st Cir. 1990). "If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking." *Anderson*, 862 F.2d at 918.
>
> There is an exception to this rule for "plain error" but it applies only where the error results in a "clear miscarriage of justice" or seriously affects "the fairness, integrity or public reputation of judicial proceedings." [*Smith v. Massachusetts Inst. of Tech.*, 877 F.2d 1106, 1110 (1st Cir. 1989).]

The defendant failed to act expeditiously on this matter.

The defendant also claims juror confusion as a result of several other instructions that were given. As far as these claims are concerned, the defendant appears to be trying to manufacture confusion ex post facto where in fact none existed. Furthermore, the defendant also failed to object to these instructions in a timely manner.

The court concludes that defendant's claims concerning inconsistent verdicts, the special verdict forms, and certain other jury instructions are not only without merit but also they have not been raised in a timely fashion. The court need not

address the application of the plain error standard. The court denies the defendant's request for a new trial on these claims.

The defendant also claims the court erred in failing to allow its witness, Aribert Kolms, to introduce and discuss certain test reports that were in the German language. The defendant claims that these reports were important to its defense. Under Fed. R. Evid. 401, relevant evidence is admissible unless there is a basis to exclude it. Assuming the relevance of the proffered reports and their importance to the defendant's case, it was incumbent upon the defendant to provide English translations of any reports it intended to introduce into evidence at trial either as an exhibit or through the testimony of a witness. Absent an English translation, plaintiffs' counsel would not be able, in a meaningful way, to object to the contents of the reports or to cross examine the witness about the reports. The court, likewise, would not be able to carry out its duties if it could not read the reports. And finally, exhibits in German would not be understood by the jury and this would prevent the jury from properly performing its duties. The court exercised its sound discretion in this matter based on fairness, practicality and common sense. After the court had ruled on this matter, the defendant could have requested the opportunity to have the reports translated and to recall the witness. The court in all likelihood would have granted such a request. However, as the record will reflect, the defendant made no attempt to overcome the obstacle to the admissibility of this evidence, assuming it was otherwise admissible. This claim is without merit.

The defendant next claims that the testimony of Elizabeth Trull should not have been admitted. The court considered a similar request before trial and denied it. The court, in the exercise of its discretion, found that the testimony was relevant and material. This claim is without merit and does not justify a new trial.

The defendant claims that there was insufficient evidence to support a finding of design defect under the plaintiffs' negligence claim and asks the court to enter judgment as a matter of law. This issue was contested and there was a significant amount of conflicting evidence presented to the jury. The credibility of a number of witnesses was also a matter that had to be considered and resolved by the jury. In *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1521 (1st Cir. 1991), the court stated:

> On a motion for judgment notwithstanding the verdict, the trial judge must view all the evidence and inferences flowing therefrom in the light most favorable to the non-moving party. *Hendricks & Assoc., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991); *Austin v. Lincoln Equipment Assoc., Inc.*, 888 F.2d 934, 937 (1st Cir. 1989); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 558 (1st Cir. 1989). Such a motion should be granted only if, as a matter of law, the evidence would lead a reasonable jury to only one conclusion — that the moving party was entitled to judgment. *Hendricks*, 923 F.2d at 214; *Austin*, 888 F.2d at 937; *Gutierrez-Rodriguez*, 882 F.2d at 558. In making this determination, the district court "'may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence.'" *Hendricks*, 923 F.2d at 214 (citations omitted). A denial of judgment n.o.v. is reviewed *de novo*; in reviewing the decision we utilize the same standards as those applied by the trial court. *Hendricks*, 923 F.2d at 214; *Austin*, 888 F.2d at 937.

The trial judge cannot act as a thirteenth juror but instead must review all the evidence in accordance with the standard articulated in the *Raymond* case. *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). After considering all of the evidence in the light most favorable to the plaintiff, the

court finds that there was sufficient evidence from which a reasonable jury could find that the defendant was liable under the plaintiffs' negligence claim. Therefore, the court denies defendant's request to enter judgment as a matter of law.

The defendant requests that the verdicts for each plaintiff be remitted to zero based on the defendant's theory of inconsistent responses to the special verdict-questions. The court has previously addressed the inconsistency issue in this order and denies this request for the same reasons previously given.

The defendant objects to the awarding of prejudgment interest pursuant to New Hampshire Revised Statutes Annotated ("RSA") § 524:1-b. Interest is awarded in accordance with New Hampshire law and the defendant has presented no legal basis in support of its position that it should not be awarded. In any case which has been pending for a number of years and has been tried twice as this one has, the accruing of interest on any potential award of damages is a factor which the parties must weigh and consider when evaluating the benefits and risks of going to trial or settling the case. This claim is without merit.

Finally, the defendant claims that the jury's award of damages to each plaintiff was against the weight of the evidence and manifestly exorbitant and requests a remittitur or a new trial. In *Grajales-Romero v. American Airlines, Inc.*, 194 F.3d 288, 300 (1st Cir. 1999), the court stated:

> Pursuant to the federal rule, "[a] verdict should stand unless it is 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice to permit it to stand.'" *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 80-81 (1st Cir. 1984). Although the defendant faces a heavy burden in meeting this standard, excessive damage awards are not immune from review.

The jury had to weigh and consider a significant amount of conflicting evidence, concerning the nature and extent of Nathaniel's injuries and the economic losses associated with them, and the probable duration of Benjamin's life and his probable capacity to earn money had not his death occurred. In reviewing the evidence on damages, the court notes that the defendant did not call an economic expert witness but instead relied on cross-examining the plaintiffs' economic expert. Considering all of the evidence relevant to past medical expenses, and the nature and extent of Nathaniel's injuries and his economic losses, the court finds that there was sufficient evidence from which a reasonable jury could award Nathaniel damages in the amount of $8,917,335.27. Considering all of the evidence relevant to Benjamin's expenses, the probable duration of Benjamin's life, and his probable capacity to earn money, had not his death occurred, the court finds that there was sufficient evidence from which a reasonable jury could award Benjamin's estate damages in the amount of $1,290,960.70. Furthermore, the court cannot find that either the verdict was grossly excessive, inordinate, shocking to the conscience, or so high that it would be a denial of justice to permit it to stand. The defendant's request for a remittitur is denied.

Conclusion

Defendant's motions (document nos. 225, 226) are denied.

SO ORDERED.

/s/
Joseph A. DiClerico, Jr.
District Judge

June 6, 2001

cc: John J. Cronin III, Esquire

David P. Angueira, Esquire
Howard B. Myers, Esquire

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 01-2010

ELIZABETH TRULL,

Plaintiff.

NATHANIEL TRULL, BY HIS FATHER AND NEXT FRIEND OBO, DAVID TRULL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BENJAMIN TRULL,

Plaintiffs, Appellees,

v.

VOLKSWAGEN OF AMERICA, INC.; VOLKSWAGENWERK A.G., WEST GERMANY,

Defendants, Appellants.

Before

Boudin, *Chief Judge,*
Campbell, *Senior Judge,*
Torruella, Selya, Lynch, Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: February 11, 2003

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be *denied*.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc: Mr. Angueira, Mr. Cronin, Mr. Cantor and Mr. Myers.]

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 01-2010

NATHANIEL TRULL, PPA DAVID TRULL AND DAVID TRULL, ADMINISTRATOR OF THE ESTATE OF BENJAMIN TRULL,

Plaintiffs, Appellees,

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN, AG,

Defendants, Appellants.

JUDGMENT

Entered: November 14, 2002

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Costs on appeal awarded to plaintiff.

By The Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

Certified and Issued
as mandate under
Fed. R. App. P. 41
Feb. 27, 2003

RICHARD CUSHING DONOVAN
Clerk

/s/_____
Deputy Clerk

[cc: Mr. Myers and Mr. Cantor.]

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

David Trull as Father and
Next Friend of Nathaniel Trull

v. Civil No. 94-15-JD

Volkswagen of America, Inc.
Volkswagen, A.G.

SPECIAL VERDICT FORM

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions?

No
(Yes or No)

(If you answered "Yes" to question 1, answer question 2.)
(If you answered "No" to question 1, go to question 3.)

2. Do you find by a preponderance of the evidence that the defective condition caused, or substantially caused, injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

_____
(Yes or No)

* *

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

Yes
(Yes or No)

(If you answered "Yes" to question 3, answer question 4.)
(If you answered "No" to question 3, skip question 4 and go to the bottom of this page for further instructions.)

4. Do you find by a preponderance of the evidence that the defendant's negligence in designing and testing the 1986 Vanagon caused or contributed to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

Yes
(Yes or No)

* *

Further Instructions

If you have answered "Yes" to question 1 *and* question 2, and/or question 3 *and* question 4, then proceed to question 5.

Otherwise, conclude your deliberations.

Allocation of Injuries

5. Do you find that the defendant has proved by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect?

No
(Yes or No)

(If you answered "No" to question 5, go to question 6.)
(If you answered "Yes" to question 5, go to question 7.)

* *

Damages — Answer Question 6 *or* Question 7, as appropriate.

6. Assess the total amount of the damages sustained by Nathaniel Trull as a result of the accident in question.

Eight million nine hundred seventeen thousand
three hundred thirty five dollars and twenty-seven cents
(Words, not figures.)

(If you answer question 6, do not answer question 7.)

7. Assess the amount of damages sustained by Nathaniel Trull during the accident in question which are attributable to the design defect.

_____
(Words, not figures.)

(If you answer question 7, do not answer question 6.)

Date: April 20, 2001

/s/
Foreperson

APPENDIX F

EXCERPTS OF JURY INSTRUCTIONS

* * *

[R. 2467] As you know this case arises out of a collision which occurred on February 19th, 1991, in Conway, New Hampshire. Benjamin Trull and Nathaniel Trull were passengers in a 1986 Volkswagen Vanagon driven by their father, David Trull, when it collided with a 1979 AMC Concorde. Benjamin Trull was killed in the accident and Nathaniel Trull sustained injuries. One action is brought by David Trull as administrator of the estate of Benjamin Trull, and other action is brought by David Trull on behalf of his son, Nathaniel Trull. It is your duty to give separate, individual considerations to the claims made [R. 2468] by each plaintiff.

The plaintiffs claim that the defendant designed the 1986 Volkswagen Vanagon with a defect which rendered the vehicle defective and unreasonably dangerous. The plaintiffs claim that the 1986 Volkswagen Vanagon was defectively designed because it lacked lap/shoulder belts in each of the rear seating positions. The plaintiffs contend that as a result of this design defect, the vehicle was defective and unreasonably dangerous and that this condition caused or substantially caused injuries to Nathaniel Trull and the death of Benjamin Trull.

The defendant denies that the 1986 Vanagon was defectively designed as claimed and asserts that the vehicle was reasonably safe for its intended use.

The plaintiffs have the burden of proving their claims by a preponderance of the evidence.

The plaintiffs have asserted strict product liability and negligence claims against the defendant. However, they need not prove both claims to recover. They will be entitled to

recover if they prove one or the other of these claims. No claim is made by the plaintiffs for failure to warn or give notification of the alleged design defect. To the extent that there was any evidence relating to this [R. 2469] matter, you are to disregard it.

I will discuss each of the claims separately.

In order to prevail on their claim of strict product liability, the plaintiffs must prove by a preponderance of the evidence both of the following elements:

One, that the design of the 1986 Vanagon created a defective condition unreasonably dangerous to the plaintiffs; and,

Two, that the defective condition caused or substantially caused injuries to the plaintiffs over and above those which were probably caused as a result of the original collision.

A defect in design occurs when the product sold has been manufactured in conformity with the manufacturer's design, but the design itself presents unreasonable dangers to users. In making that determination, consider whether the design presents an unreasonable danger and the nature and extent of that danger, if any. Then you should consider the desirability and usefulness of the product to the public as a whole balanced against the risk of danger, the cost, and the practicality of reducing the risk of danger.

[R. 2470] Even if you decide that the product is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing. Liability may exist if the manufacturer did not take available and reasonable steps to lessen or eliminate the danger of even a useful or a desirable product. The manufacturer is not obligated to design the safest possible

product or a safer product or one as safe as others make, so long as the design that has been adopted is reasonably safe for the intended use of the product.

A product is not defectively designed or unreasonably dangerous merely because it is possible to be injured while using it.

The term "unreasonably dangerous" is not to be interpreted or applied in a manner that makes the manufacturer absolutely liable or an insurer of the product. A manufacturer is not required to guarantee that a product will not cause injury. What the manufacturer is required to do is to design, make, and sell a product which is free from defective conditions that are unreasonably dangerous to the user.

Even if the manufacturer has exercised [R. 2471] reasonable care in designing a product under the doctrine of strict product liability, the manufacturer is liable if the product as designed is defectively designed and unreasonably dangerous for its foreseeable uses.

In this case it has not been alleged or proved that any defect in the design of the 1986 Vanagon caused the accident to occur; that is, caused the two vehicles to collide with each other. What the plaintiffs have alleged is that the defendant is liable in strict product liability because the claimed design defect in the 1986 Vanagon caused or contributed to cause Nathaniel's and Benjamin's injuries to be more severe in this collision than they would have been — than they would have otherwise been had the defective design not existed.

This is a crashworthiness case in which the plaintiffs contend that severe injury and death were used by the claimed design defect in the 1986 Vanagon. Crashworthiness is the protection that a passenger motor vehicle affords its passengers

against personal injury or death as a result of a motor vehicle accident. Therefore you will be focusing on the design of the 1986 Vanagon involved in the collision. You will not be called upon to make any [R. 2472] legal judgments concerning the conduct of either driver because legal judgments about either driver are irrelevant to the issues you must decide in this case.

The plaintiffs have the burden of proving by a preponderance of the evidence that the 1986 Vanagon was defectively designed and that the defective design proximately caused injuries to the plaintiffs over and above those which were probably caused as a result of the original impact or collision. Under this theory the defendant is liable for the injuries to Nathaniel and Benjamin only to the extent that the claimed design defect was a proximate cause of enhancing, increasing, or worsening the injuries that they sustained over and above any injuries they probably would have sustained otherwise as a result of the impact or collision.

A legal cause of an injury is a cause which is a substantial factor in bringing about the injury.

In determining whether the conduct of the defendant caused or contributed to cause the injuries to the plaintiffs, you need not find its conduct was the sole cause of the injury, but only that it was a substantial factor in bringing about the injury even though other factors may have contributed to cause the [R.2473] injury.

Proximate cause is that which in the natural continuous sequence, unbroken by any efficient intervening cause, produces an injury without which the injury would not have occurred. An act or omission is not a proximate cause unless it played a substantial part in bringing about or actually causing the injury. An act or omission is not a proximate cause unless the injury is a direct result of the act or omission and would not

have happened but for the act or omission. If the injury would have occurred anyway without any defect in the design of the vehicle, then any design defect you find did exist would not be a proximate cause of the injury.

The plaintiffs have also alleged that the defendant was negligent because it failed to exercise reasonable care when it designed and tested the1986 Vanagon and that the Vanagon was not crashworthy. They contend that this failure resulted in the claimed defect in the vehicle; namely, the vehicle lacked lap/shoulder belts in each of the rear seating positions. The plaintiffs claim that defendant's negligence caused or contributed to the cause of their enhanced injuries.

The defendant denies the plaintiffs' claim [R. 2474] and contends that it exercised reasonable care in designing and testing the 1986 Vanagon and that the Vanagon was reasonably safe for its intended use.

In order to prevail on their claim of negligent design, the plaintiffs must prove by a preponderance of the evidence both of the following elements:

One, that the defendant failed to exercise reasonable care in designing and testing the 1986 Vanagon; and,

Two, that the defendant's failure to exercise reasonable care in designing and testing the 1986 Vanagon caused or contributed to the cause of the plaintiffs' injuries over and above those which were probably caused as a result of the original collision.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which the ordinary, prudent person or manufacturer would use under the same or similar circumstances. A failure to exercise reasonable care may result from either doing something that an ordinary, prudent person or

manufacturer would not do under the same or similar circumstances, or from failing to do something that an ordinary, prudent person or manufacturer would do [R. 2475] under the same or similar circumstances.

If a person or manufacturer fails to exercise such care as the reasonably prudent person or manufacturer under the same or similar circumstances, then that person or manufacturer is said to be negligent. On the other hand, if everything was done and nothing was left undone which the reasonably prudent person or manufacturer would have done and not left undone under the same or similar circumstances, then there is no negligence.

A manufacturer is under a duty to exercise reasonable care in designing and testing a vehicle, for those uses which could be reasonably foreseen, in order to avoid an unreasonable risk of injury to the occupants. When an unreasonable danger could have been eliminated without excessive cost or loss of product efficiency, liability may attach even though the use was intended or was unintended and reasonably foreseeable. The obviousness of the danger should be evaluated against the reasonableness of the steps which the manufacturer must take to reduce or eliminate the danger.

The plaintiffs allege that the defendant's negligence in designing and testing the 1986 Vanagon caused or contributed to the cause of their enhanced [R. 2476] injuries. The plaintiffs have the burden of proving by a preponderance of the evidence that the defendant was negligent in designing and testing the 1986 Vanagon and that the negligence was a proximate cause of their enhanced injuries. The defendant is liable for the injuries to Nathaniel and Benjamin if it was negligent as claimed and that negligence was a proximate cause of producing injuries over and above those which were caused as a result of the original impact or collision.

A legal cause of injury is a cause which is a substantial factor in bringing about the injury.

In determining whether the conduct of the defendant caused or contributed to cause the injuries to the plaintiffs, you need not find its conduct was the sole cause of the injury but only that it was a substantial factor in bringing about the injury even though other factors may have also contributed to cause the injury.

Proximate cause is that which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury without which the injury would not have occurred. An act or omission is not a proximate cause unless it played a substantial part in bringing about or actually causing [R. 2477] the injury. An act or omission is not a proximate cause unless the injury is a direct result of the act or omission and would not have happened but for the act or omission. If the injury would have occurred anyway without any defect in the design of the vehicle, then the design defect would not be a proximate cause of the injury.

Evidence has been introduced concerning various motor vehicle safety standards promulgated by an agency of the United States Government. Compliance with these standards may be considered by you as some evidence that the vehicle in question was not defective and unreasonably dangerous and that the defendant was not negligent in designing the Vanagon. However, such compliance is not conclusive or controlling on the issue of the defendant's liability in this case.

Compliance with an administrative standard does not present a finding of strict liability if, after considering all of the factors I have previously discussed with you concerning a defect in design, you find by a preponderance of the evidence that the design of the 1986 Vanagon created a defective condition

unreasonably dangerous to the occupants of the Vanagon. Likewise, compliance with an [R. 2478] administrative regulation does not prevent a finding of negligence if you find by a preponderance of the evidence that a reasonably prudent manufacturer would have taken additional precautions in order to avoid unreasonable risk of injury to the occupants of the Vanagon.

To the extent that you find from the evidence that the defendant had certain internal objectives and goals, you may consider compliance or noncompliance by the defendant with its own objectives and goals along with all of the other evidence in the case in determining whether or not the vehicle was defective and unreasonably dangerous in accordance with the previous instructions I have given you concerning strict product liability and negligence.

The defendant, which is a corporation, acts through its officers, agents, servants, and employees and acquires knowledge from all of these individuals. Therefore a corporation is presumed to know what these individuals know and the information that they have gained within the scope of their employment. Therefore the corporate defendant is chargeable with the combined knowledge of all of its officers, agents, and employees acquired within the scope of their employment and authority.

[R. 2479] As previously stated, the plaintiffs both under their strict liability and negligence claims, have the burden of proving by a preponderance of the evidence that the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision. A plaintiff need not prove both claims in order to recover. It is sufficient if a plaintiff proves one or the other of the claims. If a plaintiff fails to meet his burden of

proof, you will conclude your deliberations as to that plaintiff. If a plaintiff does meet his burden of proof, then the burden shifts to the defendant to show with respect to each plaintiff by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect. In other words, if a plaintiff makes a showing that the design defect was a substantial factor in producing injuries to the plaintiff over and above those which were probably caused or as a result of the original collision, then the burden shifts to the defendant to show which injuries are attributable to the initial collision and which to the design defect.

If the defendant fails to meet its burden on this issue of segregating the injuries between those [R. 2480] caused by the initial collision and those caused by the design defect, then all of the injuries are to be considered by you to be attributable to the design defect and therefore the responsibility of the defendant.

With respect to each plaintiff, first you will determine if that plaintiff has met his burden of proving by a preponderance of the evidence under his claim of strict liability or negligence that the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision.

If the plaintiff fails to meet his burden on both claims, you will conclude your deliberations. If the plaintiff meets his burden on one or both of his claims, then you will take up the next issue, which is to determine which injuries were attributable to the original collision and which to the design defect. On this issue, as I have just explained to you, the defendant has the burden of proof, and if the defendant fails to meet this burden, then all of the injuries are to be attributed to the design defect.

Lastly, you will assess damages for each plaintiff for injuries sustained in the accident, [R. 2481] keeping in mind the following:

One, if the defendant has shown by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect, then you will only assess damages for those injuries sustained by a plaintiff which are attributable to the design defect.

Two, if the defendant has failed to meet its burden of allocating the injuries between those caused by the initial collision and those caused by the design defect, then you will assess damages for all injuries sustained by the plaintiff due to the accident.

* * *

APPENDIX G

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered

pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

* * *

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Supreme Court, U.S.
FILED
JUN 9 - 2003
OFFICE OF THE CLERK

No. 02-1677

IN THE

Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Petitioners,

v.

NATHANIEL TRULL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

It is respectfully submitted that, based on the established facts, the controlling law and the procedural history of this case, further appellate review by this Honorable Court is not warranted. An experienced and distinguished district court judge, Joseph A. DiClerico, presided at the trial and ruled on the post-trial motions. A seasoned and eminent panel of the First Circuit Court of Appeals heard Volkswagen's appeal. These courts concluded that Volkswagen failed to protect the record in this case on multiple occasions, thus waiving the position it now argues. These rulings were based not only on established First Circuit principles which have been settled for decades, but also on a universally accepted construction of Rule 51 of the Federal Rules of Civil Procedure. Moreover, both the district judge and the First Circuit concluded that Volkswagen had asserted disingenuous arguments and had misstated the record. That approach has continued in Volkswagen's Petition for Writ of Certiorari.

This product liability case arising out of an incident in which one child was killed and another child was brain injured was tried twice in the United States District Court for the District of New Hampshire. The case was originally filed in January 1994 and first went to trial in May 1998 before Judge DiClerico. In that first trial, the jury returned a verdict for Volkswagen. The Trulls appealed, contending that the district court erred in its instructions to the jury as to who bears the burden of proof in a crashworthiness case relating to enhancement of injuries. The First Circuit Court of Appeals certified that issue to the New Hampshire Supreme Court. *Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999). The Supreme Court of New Hampshire agreed with plaintiffs' position, and reiterated the concept that under New Hampshire law, it is appropriate in a

product liability case to submit both the theories of negligence and strict liability to the jury. *Trull v. Volkswagen of America, Inc.*, 761 A.2d 477 (N.H. 2000). The First Circuit then remanded the matter to the district court for a new trial. *Trull v. Volkswagen of America, Inc.*, 229 F.3d 343 (1st Cir. 2000).

The second trial began in April 2001, again before Judge DiClerico. The plaintiffs claimed that the 1986 Volkswagen Vanagon was negligently designed and tested and was defective in that rear seat passengers were provided with lap only belts despite the fact that rear shoulder harnesses were standard equipment in the Vanagon sold in Europe, in other Volkswagen vehicles sold in this country and could have easily been incorporated into the Vanagon sold in the United States. The case was submitted to the jury on the eleventh day of trial.

Volkswagen requested a jury instruction indicating the Trulls could win the case by prevailing on *either* their strict liability *or* their negligence claim. Volkswagen's request read, in pertinent part:

> Plaintiffs have brought this case under two theories of liability: (a) strict liability in tort; and (b) negligence; You may return a verdict for plaintiffs on either one or both of these theories. App., *infra*, 1a-2a.

In accordance with Volkswagen's request and pursuant to the agreement of the parties, the trial court instructed the jury six times that the Trulls could recover on either the basis of strict liability or negligence and that they need only prove one of these claims in order to recover (VW App., 37a-46a). Volkswagen did not object. The parties agreed to a special verdict form which specifically instructed the jury to decide the negligence claim even if it answered "No" on the strict liability claim (VW App., 34a-

36a). Volkswagen did not object. The jury returned a verdict finding "Yes" on negligence and "No" on strict liability and awarded damages. Volkswagen did not object or claim that the verdict was inconsistent prior to the discharge of the jury. After the jury was discharged, Volkswagen's counsel congratulated the Trulls' counsel. Judgment was entered for the Trulls on April 25, 2001.

On May 7, 2001, Volkswagen filed its post-trial motions for judgment as a matter of law or, in the alternative, for a new trial and for remittitur. In these motions it argued for the first time that the verdict was inconsistent. On June 6, 2001, the district court entered an order denying defendant's motions, concluding that defendant's claims of inconsistent verdict "are not only without merit but also they have not been raised in a timely fashion." (VW App., 19a-29a). The district court further found that Volkswagen "appears to be trying to manufacture confusion ex post facto where in fact none existed".

Volkswagen appealed to the First Circuit Court of Appeals. During oral argument, under careful questioning by Judge Lipez, Volkswagen admitted that it was not relying on the "plain error" exception to Rule 51, Fed. R. Civ. P. On November 14, 2002, the First Circuit affirmed the judgment below in all respects, *Trull v. Volkswagen of America, Inc.*, 320 F.3d 1 (1st Cir. 2002) (VW App., 1a-18a). The court concluded that:

1. Volkswagen had forfeited its objection to any verdict inconsistency by failing to object at any time prior to the jury's discharge;

2. Volkswagen had waived any objection to verdict inconsistency by failing to object to the instructions to the jury pursuant to Rule 51, Fed. R. Civ. P.;

3. It was not plain error under New Hampshire law to enter judgment for the Trulls on negligence, but not on strict liability;

4. There was a "plethora of evidence" supporting the jury's finding that Volkswagen was negligent.

Volkswagen filed a petition for rehearing which was denied on February 11, 2003. On February 27, 2003, the First Circuit denied Volkswagen's motion to stay the mandate and mandate was issued immediately. On March 7, 2003, Volkswagen applied to this Court for a stay of the mandate. Justice Souter denied the application on March 11, 2003. Shortly thereafter, Volkswagen paid the judgment.

REASONS FOR DENYING THE PETITION

I. Introduction

The way in which Volkswagen describes the proceedings below is completely inaccurate. Volkswagen also misstates the issues which would be before the Court if the writ were granted.

Volkswagen acquiesced through all phases of the trial with the concept that the Trulls could recover in negligence even if the jury found no strict liability. Volkswagen even requested a jury instruction to that effect. The following chronology details Volkswagen's consent to the proposition that the Trulls could recover in negligence even if the jury found no strict liability.

1. Volkswagen requested an instruction which explained that the case was brought under the theories of strict liability and negligence and that, "You may return a verdict for plaintiffs on either one or both of these theories". (App., *infra*, 1a-2a).

2. Volkswagen failed to object to a "Yes" on negligence/"No" on strict liability verdict, either at the charging conference or after the final draft of instructions was prepared. (VW App., 27a).

3. Volkswagen explained in its closing argument to the jury that if they answered no to the question of defect, they did not get to the issue of causation with respect to strict liability. Volkswagen then went on to discuss the questions relating to negligence. (App., *infra*, 3a).

4. Volkswagen failed to object to the Trulls' closing argument, in which plaintiffs explained the two alternative theories of recovery to the jury and advised the jury that the Trulls could recover under either theory. (App., *infra*, 4a-6a).

5. Volkswagen failed to object to the court's instruction that, "The plaintiffs have asserted strict product liability and negligence claims against the defendant. However, they need not prove both claims to recover. They will be entitled to recover if they prove one or the other of these claims." (VW App., 37a-38a).

6. Volkswagen failed to object to the court's instruction that, "A plaintiff need not prove both claims in order to recover. It is sufficient if a plaintiff proves one or the other of the claims". (VW App., 44a).

7. Volkswagen failed to object to the court's instruction that, "If the plaintiff fails to meet his burden on both claims, you will conclude your

deliberations. If the plaintiff meets his burden on one or both of his claims then you will take up the next issue. . . ." (VW App., 45a).

8. Volkswagen failed to object to the directions after Question 1 on the Special Verdict Forms, which advised the jury to go to the question of negligence if they answered "No" to strict liability, and the court's corresponding explanation that, "If you answer no to question number one . . . you've made a determination that under the theory of strict liability, the plaintiff did not meet his burden of proof . . . If you come to that conclusion . . . you would go over and take up the negligence claim." (VW App., 34a; App., *infra*, 8a).

9. Volkswagen failed to object to the directions after Question 4 on the Special Verdict Forms, which advised the jury to proceed to crashworthiness damages issues, if they answered "Yes" to either strict liability and/or negligence, and to the court's corresponding instruction that, "there are two claims here, strict liability and negligence. All the plaintiff needs to do in order to recover damages is to prevail on one of those claims. The plaintiff need not prove both of those claims. If the plaintiff proves one of those claims, the plaintiff would be entitled to damages." (VW App., 35a; App., *infra*, 9a).

10. Volkswagen failed to object to the court's instruction that "all the plaintiff needs to do is to prevail on one of the claims in order to pass on the damage issue." (App., *infra*, 9a).

In the face of this record, Volkswagen seeks to avoid the inexorable conclusion that it invited the error which it now alleges by discussing purported differences in the way the circuit courts have handled issues relating to Rule 49. But if certiorari were granted in this case, this Court would never reach those issues. This case would be resolved on the same issue as that upon which it was resolved in the lower courts — waiver. That is regardless whether the verdict is characterized as one submitted or returned under Rule 49(a) or Rule 49(b), no court would overlook Volkswagen's continued acquiescence with the concept that the plaintiffs could win in negligence while losing in strict liability. While Volkswagen claims that most courts would reach the merits of its argument, nothing could be further from the truth. In fact, no other court would reach the merits of defendant's argument and Volkswagen cites no case to alter this conclusion.

From the moment Volkswagen filed its post-trial motions, it has adopted a strategy of diversion and obfuscation. Disregarding the fact that Volkswagen's counsel congratulated plaintiffs' counsel after the verdict, Volkswagen argued in the district court that the verdict slip should be construed to mean that Volkswagen won the case. Desperately trying to convince the district court that the jury somehow failed to follow the court's instructions, Volkswagen claimed the jury must have been confused. The district judge, however, recognized the transparency of Volkswagen's tactics by stating that, "the defendant appears to be trying to manufacture confusion ex post facto where in fact none existed." (VW App., 24a).

Volkswagen's bankrupt strategy continued in the First Circuit. Rejecting the contention that the district court somehow did not afford Volkswagen an adequate opportunity to object to the verdict, the First Circuit found "nothing in the record to substantiate this implication" (VW App., 3a). Although

Volkswagen claimed that it had been thwarted in its attempt to lodge objections to the verdict, the First Circuit rejected Volkswagen's claim, stating, "there is nothing in the record to indicate that VW wished to object to anything" (VW App., 4a). Judge Campbell, concurring, simply concluded that "[i]f VW wanted to argue the inconsistency issue, it needed to preserve its rights". (VW App., 18a).

The attempts to misstate and divert attention continue in this Court. Volkswagen states on numerous occasions in its Petition that it should not be faulted for failing to object to submission of both negligence and strict liability theories because submission of both theories is specifically warranted under state law. But whether both theories were appropriately submitted is not and has never been the issue on which the case has turned. The issue has always been and continues to be whether Volkswagen waived its inconsistency argument on the merits by continually failing to argue that a verdict for defendants on strict liability would preclude a verdict for plaintiffs on negligence. As to this, the true issue, Volkswagen continually advocated for and adopted the position directly contrary to that which it now asserts. Under the doctrine of invited error, a principle universally followed in all of the circuits, Volkswagen may not be heard on the merits of its argument.

II. The Case Was Correctly Decided Below

A. Volkswagen's Failure To Comply With Fed. R. Civ. P. 51 Precludes Consideration Of The Issues It Raises Pursuant To Fed. R. Civ. P. 49

An examination of the record below indicates that Volkswagen did not preserve any objection which would now allow it to argue before this Court that the verdict is inconsistent. Volkswagen had every opportunity to assert the position that a finding of no strict liability would result in judgment in its favor. Instead, it agreed with and adopted the position that the Trulls could recover on their negligence claim even if the jury found for Volkswagen on the strict liability claim. Thus, in accordance with the special verdict form, the trial court instructed the jury:

> Now, as you can see from the questions and from the instructions under question number one there, if you answer[1] question number one, you go on to question number two. *If you answer no to question number one, then you don't go on to question number two* because you've made a determination that under the theory of strict liability, the plaintiff did not meet his burden of proof. *If you come to that conclusion, then you would not go on to question two. You would go over and take up the negligence claim.*

(App., *infra*, 8a) (emphasis added). Volkswagen specifically agreed to and failed to object to this instruction.

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1. It appears that the court reporter omitted the words "yes to" from the transcript at this location.

Volkswagen tiptoes through its problem of not having objected to the verdict form and corresponding instructions by admitting that it "might have been preferable" if the form instructed the jury to end its deliberations after a "No" finding on question 1 (VW's Petition at 28).[2] Yes, it "might have been preferable" for Volkswagen to have made the necessary objection to preserve its argument for appeal rather than to waive it. No, Rule 51 cannot be read to excuse Volkswagen's failure to object.

As Judge DiClerico pointed out in his opinion denying Volkswagen's post-trial motions, Volkswagen had numerous opportunities to object to the concept that plaintiffs could win in negligence while losing in strict liability, but failed to do so. The court summarized the proceedings as follows:

> This case has been through two trials. If the issue of inconsistent verdicts is as significant as the defendant contends, then it is one the defendants should have anticipated and should have raised with the court earlier in the proceedings when there were numerous opportunities to do so. However, it was not raised during the charging conferences for either trial, by way of objection immediately after the jury charge was given in either trial, or by way of objection immediately following the jury's verdict in the second trial. It was in the second trial that the issue was raised for the first time in a motion filed a number of days after the verdicts were returned and the jury had been discharged.

(VW App., 21a).

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2. *See Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10 (1st Cir. 2001), where the same district court judge gave such an instruction, which the court found appropriate under the circumstances of that case, where it was requested by the defendant.

The First Circuit affirmed the decision of the district court in all respects. Concerning Volkswagen's Rule 51 waiver, the First Circuit stated:

> The instructions made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence. The verdict forms had been examined by counsel for VW before they were submitted. VW's reason for its failure to object at the critical times was that the verdicts did not become inconsistent until after the jury had completed them. But we cannot accept this; to do so would countenance agreeable acquiescence to perceivable error as a weapon of appellate advocacy. By failing to timely object to the jury instructions, VW thereby waived any objection it may have had. *See* Fed. R.Civ. P. 51

(VW App., 6a) (citations and internal quotations omitted).

Groping for an argument that there is something controversial about its garden-variety waiver, Volkswagen claims there is a conflict among the circuits concerning the manner in which Rule 51 should be interpreted. The best Volkswagen can do to manufacture this conflict is to cite *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (3d Cir. 1993) and *Holloway v. McIntyre*, 1988 WL 7961 (6th Cir.). These cases most certainly do not support the contention that a party need not comply with Rule 51 to preserve an issue for appeal. Moreover, to the extent these cases might be read to excuse non-compliance with Rule 51, they are aberrations rather than evidence of a conflict.

Loughman involved an incredibly complex proceeding in which the jury was requested to answer at least 59 interrogatories.[3] In analyzing the specific nature of that verdict form, the Third Circuit indicated that it was focusing on whether the jury's answers could be reconciled rather than whether the parties failed to object under Rule 51. The court ultimately concluded that the verdict could be harmonized based on the jury's answers to the questions submitted. *Loughman* provides no support that there is a conflict between the circuits concerning Rule 51.

Nor does the *Holloway* case provide support for Volkswagen's argument. There, the jury failed to follow the court's instructions which indicated that the employer could only be liable based on the acts of its employees. Under the verdict returned by the jury, the employer was held liable and the employees exonerated. Because the court concluded that the jury must have been confused, the Sixth Circuit upheld the district court's order vacating the judgment against the employer. Here, in contrast, as both the district court and the First Circuit recognized, the jury simply adopted one of the choices agreed to by Volkswagen: finding for the plaintiff on negligence and for the defendant on strict liability. Again, *Holloway* certainly does not indicate there is a conflict in the circuits concerning Rule 51.[4]

There is no hint in the record of this case that Volkswagen should be excused from failing to comply with Rule 51. This

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3. The verdict form is not set out in the opinion, but the court referred to the jury's response to interrogatory 59.

4. As to Volkswagen's claim that the "view" of the Third Circuit is "reflected implicitly" in other decisions (VW's Petition at 25), there is no indication whatsoever than a waiver issue under Rule 51 was in any way involved in those decisions.

Court will ordinarily not decide questions not raised in the lower courts, particularly where the party seeking to argue the issue has failed to object to a jury instruction pursuant to Fed. R. Civ. P. 51. *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, *reh. denied*, 481 U.S. 10311 (1987). Because Volkswagen's failure to comply with Rule 51 dooms any chance of success on the merits and renders moot any Rule 49-related issues, Volkswagen is unable to establish that there is any conflict between the circuits, the resolution of which would allow it to prevail on the merits. The writ should be denied.

B. No Construction Of Rule 49 Would Serve To Preserve Volkswagen's Contention That The Verdict Is Inconsistent

As is made clear by the foregoing discussion, Volkswagen did not contend that the verdict was inconsistent until days after the jury was discharged. There was good reason for this; the verdict was in fact consistent with the way the case was tried. That is, the parties agreed throughout the trial that the Trulls could recover in either negligence or strict liability. When the jury found for the Trulls on one of these theories, it was simply accepting one of the options it had been given under the instructions and the verdict form.

A reversal of the judgment in this case would sanction the unthinkable. It would allow a litigant to consistently advocate for and agree with a proposition of law or procedure throughout the trial (i.e., that the Trulls could win in negligence while losing on strict liability) and then allow the litigant to renounce that position, assume the opposing position and seek a new trial after the jury is discharged. Needless to say, allowing litigants to do that would engender chaos in the justice system. Cases would be routinely tried on multiple occasions, until the losing litigant achieved a

result to his satisfaction. In the words of the First Circuit, "to countenance a setting aside of the verdicts in this case would place a premium on agreeable acquiescence to perceivable error as a weapon of appellate advocacy." *Merchant v. Ruhle*, 740 F.2d 86, 92 (1st Cir. 1984).

Every single Circuit Court of Appeals recognizes the doctrine of invited error. That is, where a party itself proposes a jury instruction accepted by the court and later attacks that instruction on appeal, review will be denied under the doctrine of invited error. *United States v. Taylor*, 2003 WL 1459140 (9th Cir.); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 868 (2003); *United States v. Celestine*, 2002 WL 1821971 (4th Cir.), *cert. denied*, 123 S. Ct. 706 (2002); *Parker v. Champion*, 148 F.3d 1219 (10th Cir. 1998); *United States v. Baybank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991); *Harris v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991); *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); *United States v. Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Weiner v. Roll Form, Inc.*, 744 F.2d 797 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *United States v. Kakley*, 741 F.2d 1 (1st Cir.), *cert. denied*, 469 U.S. 887 (1984); *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978); *United States v. Wiggins*, 530 F.2d 1018 (D.C. Cir. 1976); *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767 (3d Cir. 1975).

In the case at bar, it is obvious why Volkswagen did not object prior to jury discharge. Put simply, the verdict of the jury was consistent, not inconsistent, with the instructions that had been given. While some of the points in Volkswagen's petition as to conflicts in Rule 49 decisions might be germane to some

other case, they have no relation to this one, where the verdict delivered by the jury was completely consistent with the legal principles stated in the charge.[5] The jury was properly instructed on what the Supreme Court of New Hampshire has referred to as the "semantical and theoretical differences" between the "apples" of negligence and the "oranges" of strict liability. *Thibault v. Sears Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843, 849 (1978). In accordance with this principle, the jury was given three choices: to find for the Trulls on both theories, to find for Volkswagen on both theories, or to find for each of the parties on one of the theories. The jury had three choices and accepted one of them. Any conflicts which exist between the circuits as to the various aspects of Rule 49 cannot negate the simple fact that the jury verdict here was not inconsistent with the law and choices agreed to by the parties.

Thus, Volkswagen's lengthy discourse as to the fine distinctions between Rule 49(a) and Rule 49(b) is of no moment here. Needless to say, Volkswagen cites no case under either Rule 49(a) or 49(b) where a litigant prevailed on appeal after requesting a jury instruction adopted by the court and then claiming that an inconsistent verdict resulted from the court's acceptance of the instruction. The courts have rejected this type of argument through the use of various terms — waiver, judicial estoppel, invited error, law of the case — but have never sanctioned it. To do so would result in a mockery of the justice system.

---

5. Volkswagen complains that the verdict cannot stand because the jury did not find a "defect". That term, however, in context, is often used as a shorthand way of referring to the requirement of "unreasonably dangerous defective condition" and/or negligent conduct. For example, in the decision of the Supreme Court of New Hampshire in this case, the court in one instance uses the term "design defect" and in another instance uses the term "defendant's conduct" in referencing the showing plaintiff must make to shift the burden of proof on injury causation to the defendant. *Trull v. Volkswagen of America, Inc.*, 145 N.H. 259, 761 A.2d 477, 482, 483 (2000).

While it is certainly true that this Court has on occasion granted certiorari to address conflicts in the Circuits as to interpretation of procedural rules,[6] this Court should not grant certiorari in a case where the merits of any such conflict would

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6. If this Court had wished to address issues relating to Rules 49(a) and (b), it had a much better opportunity to do so in *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir.), *cert. denied*, 123 S. Ct. 539 (2002), in which Ford raised a virtually identical argument to that which Volkswagen urges here. This case has remarkable similarities to the *Jarvis* case in which this Court denied certiorari on November 12, 2002. Both cases are automotive product liability cases in which virtually identical verdict forms were utilized. In each of the cases the jury found for the plaintiff on negligence but for the defendant on strict liability. In each case, the plaintiff claimed that the defendant had failed to preserve its objection to the allegedly inconsistent verdict. In *Jarvis* the Second Circuit agreed, finding for the plaintiff in a two-to-one decision. Because of the extreme similarity of the *Jarvis* case to the case at bar, Volkswagen here had no choice but to argue that *Jarvis* was an "erroneous decision" in seeking rehearing in the First Circuit. This Court denied Ford's Petition for Writ of Certiorari in *Jarvis* despite the fact that *Jarvis* presented a much stronger record for the manufacturer than that in this case. Specifically, the *Jarvis* record involved the following:

- Ford argued before the case was submitted to the jury that the case should not be submitted on both strict liability and negligence. Volkswagen made no such contention here.

- Ford objected to the alleged inconsistency of the verdict before the jury was discharged. Volkswagen made no such objection here.

- The trial court specifically instructed the jury that "if . . . you find the product was not defective . . . you will find that Ford was not negligent". The jury was not so instructed here.

never be reached. The case at bar involves a pedestrian attempt by a litigant to play fast and loose with the federal court system by attempting to change its position after failing to protect the record and losing at trial. No Circuit Court of Appeals would come to the aid of such a litigant; this Honorable Court should certainly not do so.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF DEFENDANTS' REQUEST FOR JURY INSTRUCTIONS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 94-15-JD

ELIZABETH TRULL, NATHANIEL TRULL
PPA DAVID TRULL, DAVID TRULL INDIVIDUALLY
AND DAVID TRULL, ADMINISTRATOR OF THE
ESTATE OF BENJAMIN TRULL,

Plaintiffs

v.

VOLKSWAGEN OF AMERICA, INC.
and VOLKSWAGEN, A.G.,

Defendants

DEFENDANTS' REQUEST FOR JURY INSTRUCTIONS

Proposed Instruction No. 1

You are instructed to return a verdict in favor of the defendants, Volkswagen of America, Inc. and Volkswagen, A.G.

* * *

Appendix A

Proposed Instruction No. 8

Alternative Theories.

Plaintiffs have brought this case under two theories of liability: (a) strict liability in tort; and (b) negligence; You may return a verdict for plaintiffs on either one or both of these theories.

Plaintiffs' strict liability theory arises from the allegation that the defendants manufactured and sold a vehicle that contained defects which rendered the vehicle defective and unreasonably dangerous as well as a claim that defendants failed to warn Mr. and Mrs. Trull and their family about these claimed defects.

Plaintiffs have also alleged that defendants are liable under a theory of negligence. Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a (reasonably careful) person or corporation would use under the same or similar circumstances. This is the standard of care that all persons are expected to live up to. Negligence may consist of either doing something that a (reasonably careful) person would not do under the same or similar circumstances or failing to do something that a (reasonably careful) person would do under the same or similar circumstances. Failure to exercise due care amounts to legal fault if you find it caused or contributed to cause the injury or damage suffered by the plaintiffs.

N.H. Civil Jury Instructions, No. 6.1

* * * *

APPENDIX B — EXCERPTS OF VOLKSWAGEN'S CLOSING ARGUMENT

[Commencing R. 2407]

* * *

Now, you are going to be given a verdict form by the Court and that verdict form is going to have a number of questions on it. One of those questions is going to be was the Volkswagen 1986 [2408] Vanagon defective and unreasonably dangerous. The Court will give you more instruction on that, but if you answer no to that question, then you don't go any further. You don't get to issues of causation with respect to the strict liability.

There's going to be another question involving negligence. Was the design and manufacture and sale of the Volkswagen — was Volkswagen negligent in doing that. If you answer no to that question, you go no further.

I submit to you, ladies and gentlemen, that when you go to the jury room and evaluate the evidence, you can reach only one conclusion, a no answer to both of those questions.

Thank you very much.

* * * *

APPENDIX C — EXCERPTS OF TRULLS' CLOSING ARGUMENT

[Commencing R. 2440]

* * *

Ladies and gentlemen, what we have in this case are two claims. One is strict liability and one is negligence, and we haven't talked much about this, so let me just explain this to you, and the judge will explain it in detail.

There are two theories under the law. One says, strict liability, that if a manufacturer makes a product that's defective or unreasonably dangerous without looking at the manufacturer's conduct, and if that defect or unreasonably dangerous product causes an injury, that's it. I've proven my case.

The other one, negligence, looks at the [2441] conduct, the attitude, the testing, the designing of the product, the conduct of the defendant which is called negligence; and those are the two theories.

Now, here's what I want you to remember. Under strict liability — and listen to Judge. DiClerico and see if he says this — if the manufacturer did not take reasonable steps to lessen or eliminate the danger, you can find them liable for strict liability.

Well, ask yourself how could Volkswagen have lessened or eliminated the danger of these defective unreasonably unsafe lap/shoulder belts? Very simple. You put in lap/shoulder belts. That's all they had to, do.

Appendix C

Under the theory of negligence a manufacturer's required to design and sell a vehicle without any reasonable dangers. The failure to do what a reasonable and prudent manufacturer should do is enough for you to find that they are liable. Well, what do you think a reasonably prudent manufacturer should have done? I'm showing you right here. Here's our American companies. They do it. They tell the people. They at least advise the people of the availability of those lap/shoulder belts, not Volkswagen. They don't put them in and they don't [2442] even tell you about them. And if the unreasonable danger can be eliminated or reduced without excessive cost, that you can use to find them negligent with.

Well, what was the added cost to Volkswagen to put in these lap/shoulder belts if they are already doing it on the same production line for Germany? Zero, doesn't cost them anything. According to Mr. Meissner, they charge the customer.

There's another issue you are going to be looking at. It's called proximate causation, and I apologize for throwing all of this at you, but you are going to have to deal with it, so I want you to be somewhat familiar with it. A fancy word, proximate causation. What it means is that if you find that Volkswagen was strictly liable or negligent, you have to say to yourself was their conduct, was that strict liability or negligence, a legal cause of the injuries to these boys?

Appendix C

Now, keep in mind I don't have to prove to you that their negligence or strict liability was the only cause or the sole cause. I don't have to prove that to you. Listen to the judge. I only have to prove to you that that strict liability or negligence was a proximate cause, was a substantial contributing factor to the injury.

* * * *

APPENDIX D — EXCERPTS OF JURY INSTRUCTIONS

[Commencing R. 2489]

* * *

Now, attached to your instructions are copies of the special verdict forms. There is one form for Nathaniel — for the plaintiff, Nathaniel Trull, and one form for the plaintiff, Benjamin Trull, and we have put the names in bold type so that you do not confuse the two since the formal title of the cases is very similar.

As I said, a special verdict form for each of the plaintiffs because you are to consider each claim separately. The foreperson will have an original special verdict form and will be responsible for filling out that form. This form follows the order in which I gave you the instructions. So in a way it provides an order for your deliberations.

As I said there are two claims here. One is under the theory of strict liability and one is under the legal theory negligence. You will first take up the strict liability claim and you will address the [2490] first question, which says, do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions? You will answer that question yes or no. If you answer that question yes, then you have a second question to answer under the strict liability claim, and that is the causation question. Do you find from a preponderance of the evidence that the defective condition caused or substantially caused injuries to Nathaniel Trull over

and above those which were probably caused as a result of the original collision? You will answer that question yes or no.

Now, as you can see from the questions and from the instructions under question number one there, if you answer question number one, you go on to question number two. If you answer no to question number one, then you don't go on to question number two because you've made a determination that under the theory of strict liability, the plaintiff did not meet his burden of proof. If you come to that conclusion, then you would not go on to question two. You would go over and take up the negligence claim.

The negligence claim, question three, asks you the following question. Do you find by a [2491] preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions? You will answer that question yes or no. Again, if you answer that question yes, then you will go on to question four, which is the causation question. Did the defendant's negligence cause or contribute to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision? However, if you answer question three no, that means that you have found that the defendant was not negligent or that the plaintiff did not meet his burden in that case; so there's no need to go on and answer question four.

At that point, depending on what you have done, you address the instructions at the bottom of the page that say further instructions.

Now, as I said, there are two claims here, strict liability and negligence. All the plaintiff needs to do in order to recover damages is to prevail on one of those claims. The plaintiff need not prove both of those claims. If the plaintiff proves one of those claims, the plaintiff would be entitled to damages. Obviously if the plaintiff proved both of those claims, the plaintiff would be entitled to [2492] damages. If the plaintiff doesn't prove either one of those claims, the plaintiff is not entitled to damages.

So that is what these further instructions reflect. If you have answered yes to questions one and two, that would be yes on strict liability, and yes to questions three and four, then you would go on to answer more questions. Let me do the "or" part of it now, if you have answered yes to question one and two or question three and four.

Once again, that's another way of saying that all the plaintiff needs to do is to prevail on one of the claims in order to pass on the damage issue.

* * * *

(A)

Supreme Court, U.S.
FILED
JUN 9 2003
OFFICE OF THE CLERK

No. 02-1677

In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

NATHANIEL TRULL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APP

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(U.S.D.C. N.H. June 2, 2001) 1

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Nathaniel Trull, et al.

v. Civil No. 94-015-JD

Volkswagen of America, et al.

ORDER

Defendant's motion for reconsideration (document no. 241) is denied. The court notes the following in addition to what it has previously stated in its order of June 6, 2001 (document no. 239).

The defendant had ample opportunity to raise the issue of inconsistent verdicts during the charging conference when the instructions following question one (strict liability) on each verdict blank were discussed. Those instructions directed the jury to answer question three (negligence) if they answered "No" to question one (strict liability). Under the defendant's theory of inconsistent verdicts, the jury should have been instructed to conclude their deliberations if they answered "No" to question one, and when the court failed to do so, the defendant should have objected to the instructions following question one in accordance with the requirement of Fed. R. Civ. P. 51. The defendant failed to make such an objection.

Under the negligence claim, the jury was instructed to evaluate the conduct of the defendant in designing and testing the vehicle in question in light of certain applicable legal standards. There was sufficient evidence from which a reasonable jury could find that the defendant's conduct was negligent in designing the vehicle. In addition, there was sufficient evidence from which a reasonable jury could find that the defendant was negligent in testing the vehicle in question.

With respect to the test reports in the German language offered into evidence by the defendant and which the court did not admit into evidence, the defendant has not addressed the circumstances under which these tests were purportedly admitted in the first trial nor has the defendant cited the court to the record in the first trial in support of its position on this issue. It is not the obligation of the court to scour the record on the defendant's behalf. However, notwithstanding what may have happened in the first trial, the fact is that in the second trial the plaintiffs raised a valid objection to admissibility of these tests, the court stated its reasons for excluding them, and the defendant made no attempt to overcome the obstacle to their admissibility.

The defendant has also filed a motion for leave to file a supplemental motion to defendant's motion for reconsideration (document no. 252). The motion is granted. In its supplemental motion the defendant attempts to compare the jury instructions and special verdict form used in *Wilson v. Bradlees*, 250 F.3d 10 (1st Cir. 2001), with those used in this case. Suffice it to say that the approach used in the *Wilson* case was different from that used in this case and for that reason comparison of the two cases is inapposite.

SO ORDERED.

s/Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
District Judge

July 2, 2001

cc: John J. Cronin, III, Esquire
David P. Angueira, Esquire
Howard B. Myers, Esquire

(5)

Supreme Court, U.S.
FILED
JUN 25 2003
OFFICE OF THE CLERK

No. 02-1677

In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

NATHANIEL TRULL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not take issue with the key contentions in Volkswagen's petition. They do not deny that there exist significant and recurring circuit conflicts regarding the preservation of objections to inconsistent verdicts under Rule 49. See Pet. 13-23. They do not dispute that the court of appeals placed several of these conflicts directly at issue when it retroactively characterized the verdicts here as general verdicts – although even the respondents concede that they are "special verdicts" (Opp. 2) – and then decided on that basis, after the fact, that Volkswagen was obliged to point out the verdict inconsistencies *before* the jury was discharged. They acknowledge, moreover, that this Court has previously "granted certiorari to address conflicts in the Circuits as to the interpretation of procedural rules." *Id.* at 16.

Instead of challenging the merits of Volkswagen's representations, respondents contend that if it granted certiorari the Court would "never reach" the issues presented by the First Circuit's application of Rule 49. *Id.* at 7. Calling this case an instance of "garden-variety waiver" (*id.* at 11) – and peppering their brief with suggestions that Volkswagen has somehow behaved badly by appealing at all[1] – respondents contend that Volkswagen forfeited any objection to the inconsistent verdicts by acceding to the jury instructions, which presented alternative liability theories to the jury.

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[1] Respondents assert, for example, that this appeal "involves a pedestrian attempt by a litigant to play fast and loose with the federal court system" and that no appellate court "would come to the aid of such a litigant." Opp. 17. But it surely was reasonable for Volkswagen – which *prevailed* in the first trial and in the second trial secured a jury finding that the vehicle was *not defective* – to appeal a $10 million judgment based on a finding of negligence that plainly violated both the district court's instructions and clear New Hampshire substantive law.

Respondents' waiver argument does not undermine our showing that this case is worthy of the Court's review. First, although respondents scarcely acknowledge this fact, whether Volkswagen was barred by Rule 51 from challenging the jury's inconsistent findings is one of the two issues that Volkswagen has presented for review. This "waiver" issue is sufficiently important to merit a grant of certiorari by itself.

Second, although we do not purport to argue the merits fully herein, it should be clear even now that the First Circuit's finding of waiver under Rule 51 was deeply flawed. Respondents do not answer Volkswagen's contentions that the decision below ignores accepted trial practice, calls for defense objections that flout controlling state law, requires defendants to predict irrational and inexplicable jury decisions, and will create confusion and inefficiency in many diversity cases. Moreover, the jury instructions did not "invite" the verdict inconsistency; the jury's findings were inconsistent because the jury did not *follow* the instructions, which, consistent with New Hampshire law, precluded a finding for plaintiff on negligence in the absence of a defect. See *Greenland* v. *Ford Motor Co.*, 347 A.2d 159, 163 (N.H. 1975) (jury finding of negligence would not support verdict for plaintiff "where the jury found on the count in strict liability * * * that there was no defect in the car"). In sum, there is no reason to doubt that, if the Court grants certiorari, it will have occasion to address *both* issues presented by the petition, and that *both* issues merit review.

I. THE RULING THAT VOLKSWAGEN WAIVED ITS OBJECTIONS TO THE VERDICT INCONSISTENCY PRESENTS AN ISSUE THAT IS INDEPENDENTLY WORTHY OF REVIEW

The premise of the brief in opposition is that Volkswagen's supposed waiver counsels against the grant of certiorari. That premise is nonsensical, because the propriety of the court of

appeals' ruling that Volkswagen waived its objections to the inconsistent verdicts by failing to object to the jury instructions is one of the two issues that Volkswagen has presented for review. As we explain in the petition (at 23-29), that ruling is just as troubling as the court's ruling that Volkswagen failed to preserve its objections under Rule 49, and it conflicts with the approach of most other courts. The First Circuit's finding of waiver under Rule 51 thus is not an obstacle to review: it is a *reason to grant* review.

This was no "garden-variety" waiver determination. Opp. 11. The court of appeals has adopted a novel and troubling construction of Rule 51 that threatens to cut back substantially the ability of defendants to defend against inconsistent verdicts and to interfere with the federal courts' application of state law. The problem with the court's ruling is straightforward and stark. As respondents themselves emphasize, the Supreme Court of New Hampshire reiterated *in this very case* that "it is appropriate in a product liability case to submit both the theories of negligence and strict liability to the jury." *Id.* at 1-2 (citing *Trull* v. *Volkswagen of Am., Inc.*, 761 A.2d 477 (N.H. 2000)). The district court was obliged to apply this state law. Accordingly, the notion that Volkswagen waived important rights by agreeing to instructions asking the jury to "decide the issue of liability on both the theory of strict liability and the theory of negligence" (Pet. App. 6a) is patently nonsensical.

The decision below, moreover, is part of an emerging trend to deny defendants the right to challenge inconsistent verdicts by requiring them to predict and prevent such inconsistencies. Far from relying on egregious or manipulative conduct by Volkswagen, the First Circuit applied a general rule that it is necessary to object to the submission of overlapping theories in order to maintain a right to challenge inconsistent jury findings on those theories. The court adopted that rule in *Babcock* v. *General Motors Corp.*, 299 F.3d 60 (1st Cir. 2002) – a case

argued on the same day before the same panel that heard this case. In *Babcock*, the court concluded that the defendant could not challenge inconsistent verdicts on negligence and strict liability because it "fail[ed] to object properly to the jury instructions, which made it clear that the jury could return a verdict in [plaintiff's] favor if it found either negligence or a design defect." *Id.* at 64. *Babcock* – not any particular displeasure with Volkswagen's conduct – dictated the decision below. See Pet. App. 4a-9a (citing *Babcock*).

The Second Circuit has adopted the same rule. In *Jarvis* v. *Ford Motor Co.*, 283 F.3d 33 (2d Cir.), cert. denied, 123 S. Ct. 539 (2002), it held that a defendant may not object to inconsistent jury findings on negligence and strict liability unless, in advance, it specifically directs the court's attention to the similarities between those theories under state law and points out the consequent potential for inconsistencies raised by plaintiffs' reliance on both theories. *Id.* at 61. In *Jarvis*, the Second Circuit imposed this stringent waiver rule even though the defendant *had* objected to the submission of both theories to the jury. *Id.* at 60. Respondents acknowledge the "extreme similarity" between this case and *Jarvis* (Opp. 16 n.6), and contend that the denial of certiorari in *Jarvis* counsels against granting certiorari here. But the fact that the issue in *Jarvis* recurred so quickly here is proof positive that the issue is significant and merits immediate review.[2]

---

[2] Respondents assert that the defendant in *Jarvis* had a "much stronger" case than Volkswagen because it had argued "that the case should not be submitted on both strict liability and negligence" while "Volkswagen made no such contention here." Opp. 16. But any such objection would have run afoul of the New Hampshire Supreme Court's pointed statement that it would be proper to charge both theories. *Trull*, 761 A.2d at 481. Accordingly, Volkswagen's decision to forgo such an objection was entirely proper and does not make this case a weaker vehicle than *Jarvis* for resolving the issues under Rule

These decisions are not only troubling in themselves: as the petition demonstrates, they bring the First and Second Circuits into conflict with several other circuits. Although respondents accuse Volkswagen of trying to "manufacture" a conflict, it is undeniable that the First and Second Circuits' punitive waiver rule represents a paradigm shift from the traditional means of assessing preservation of objections to verdict inconsistencies.

In scores of published decisions, courts of appeals have assessed the preservation of objections to verdict inconsistency by evaluating the objecting party's conduct *after* the verdict is returned.[3] See 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 49.11[b], 49.20[6][a] (3d ed. 1997) (collecting cases); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2510, 2513 at 216 n.19, 233 n.17 (1994 & Supp. 2003) (collecting cases). Academic commentators also have indicated that Rule 49 governs the preservation of these objections. See *id.* Despite the frequency with which the issue arises, no court other than

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51 that it presents. Furthermore, because *Jarvis* did not involve the issues of waiver under Rule 49 that Volkswagen's petition presents, it was in that respect a less attractive candidate for certiorari than this case.

[3] Moreover, as the petition explains (at 25), many courts have granted defendants judgment or a new trial because of inconsistent jury findings on alternative liability theories without suggesting that the defendant should have objected to the jury instructions. Respondents contend (Opp. 12 n.4) that the cases we cite did not present the issue of waiver under Rule 51. But it is implausible that the defendants in these cases all warned the court of the possible inconsistency and objected to the jury instructions and verdict forms on that basis. It is far more likely that the courts and the parties in these cases recognized the mainstream rule that objections to verdict inconsistency must be raised *after* the inconsistent verdict is returned.

the First and Second Circuits has treated Rule 51 as a hurdle to challenging inconsistencies in jury findings.

The Third Circuit has ruled *expressly* that the preservation of objections to verdict inconsistency depends on the objecting party's conduct after, not before, the verdict is returned. In *Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (3d Cir. 1993), the defendants argued that the plaintiffs had "waived their right to complain" about allegedly inconsistent responses to jury interrogatories "by failing to object to the instructions or interrogatories" and "failing to suggest different or additional interrogatories." *Id.* at 103. The court categorically rejected the theory that Rule 51 was pertinent to its waiver determination, stating:

> To the extent that the defendants' argument is premised on the parties' failure to object to the instructions and interrogatories under [Rule] 51, we are unpersuaded. The question before us is not whether there was error in the instructions or in the interrogatories, but the legal effect of the jury's answers * * *. We agree, however, that if there is inconsistency in those answers, the failure of plaintiffs to object might create serious problems *under [Rule] 49.*

Ibid. (emphasis added). Respondents try desperately to distinguish this case on the ground that it involved an "incredibly complex proceeding." Opp. 12. But that played no role in the decision of the Third Circuit, which correctly deemed Rule 51 to be irrelevant to the issue before it.

Respondents also try to distinguish *Holloway* v. *McIntyre*, Nos. 86-1001, 86-1898, 1988 WL 7961 (6th Cir. Feb. 4, 1988), on the ground that "the jury failed to follow the court's instructions." Opp. 12. But the jury in *this* case plainly violated the court's instructions, which, as required by New Hampshire law (see *Greenland*, 347 A.3d at 163), made a

finding of liability on negligence dependent on the existence of a defect. See Pet. 27-28. Volkswagen cannot fairly be faulted for presuming that the jury would follow the instructions as given. As the Sixth Circuit stated in *Holloway*:

> At trial,* * * it is often difficult to anticipate an inconsistency before it occurs. We do not believe a party should be held to an onerous inconsistency merely because he was not prescient of upcoming events. At least "where the instructions do not foreshadow inconsistency, there is no basis for requiring contemporary objection."

1988 WL 7961, at *5 (quoting *Merchant* v. *Ruhle*, 740 F.2d 86, 91 (1st Cir. 1984)).

The division among the circuits regarding the defendant's obligation to object to the submission of alternative theories to the jury results in dramatic differences in the outcome of cases. In most courts of appeals, defendants have no obligation to alert trial judges that the plaintiff's decision to pursue multiple liability theories could lead to verdict inconsistencies. But in the First and Second Circuits, failure to do so deprives defendants of important rights – here, the right to enforce a clear state law rule that a finding in strict liability of "no defect" trumps any negligence finding. Such fundamental inter-circuit differences in federal trial practice should be promptly addressed and resolved by this Court.

II. VOLKSWAGEN DID NOT WAIVE ITS RIGHTS UNDER RULE 51

This case would be a strong candidate for review even if it presented *only* the issue of waiver under Rule 51. If certiorari is granted, however, there can be no serious doubt that the Court also will have the opportunity to resolve the significant issues under Rule 49 that the petition presents. By agreeing to

the instructions and the verdict form, Volkswagen plainly did not waive its right to object to the inconsistent verdicts.

Rule 51 provides that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Pet. App. 48a. But Volkswagen did not forfeit any rights under Rule 51, because the jury instructions were substantially *correct* under New Hampshire law: they acknowledged plaintiffs' right to submit both strict liability and negligence to the jury, but also made it clear that Volkswagen could not be liable under either theory unless plaintiffs proved that a design defect had exacerbated their injuries.

Respondents contend that Volkswagen invited the error in the verdicts by proposing jury instructions stating "that the case was brought under theories of strict liability and negligence" and that the jury could "return a verdict for plaintiffs on either one or both of these theories.'" Opp. 4; see also *id.* at 14. Volkswagen did not "request" the instructions delivered at the second trial: the court used the same instructions that it had crafted and delivered in the first trial. In agreeing to that approach, Volkswagen did no more than acquiesce in the New Hampshire Supreme Court's ruling that "[a] strict liability action based upon a theory of defective design may be joined with an action * * * in negligence." *Trull*, 761 A.2d at 481.[5]

By accepting the district court's instructions, Volkswagen did not invite the jury to find negligence after concluding that the Vanagon was not "defectively designed." Pet. App. 34a. As the petition explains (at 4-5), the jury instructions made it clear

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[5] Volkswagen did submit, at the first trial, an instruction regarding the plaintiffs' reliance on two theories of liability, but only after plaintiffs indicated that they wished to charge both strict liability and negligence, as they were permitted to do under New Hampshire law.

that the plaintiffs could not recover under *either* of their liability theories unless they proved "that *the claimed design defect* was a substantial factor" in producing their injuries. Pet. App. 44a (emphasis added). Volkswagen's objection to the inconsistent verdicts thus was *not* based on a contention that the jury instructions were erroneous: the inconsistency arose because the jury *did not follow the instructions*. Volkswagen had no obligation to predict such an outcome.[6]

Respondents make much of the district court's instructions that the plaintiffs "need not prove both [strict liability and negligence] claims to recover" but "will be entitled to recover if they prove one or the other of these claims." Opp 5. These instructions are not objectionable either; because plaintiffs might have prevailed by proving *either* strict liability *or* negligence, the jury did not need to reach both theories. Nothing in the court's presentation of plaintiffs' liability theories suggests, however, that an express factual finding that there is *no design defect* can coexist with a finding that Volkswagen negligently designed a defective product.

Respondents also contend that Volkswagen waived its right to challenge the verdict by accepting the district court's verdict form. Taking its format from standard verdict forms used around the country (see PLAC Am. Br. 12), the special verdict form directed the jury to answer the negligence question after making, under the heading of strict liability, what amounted to a factual finding that the vehicle was not defective. The verdict form did not "invite" inconsistency any more than the jury

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[6] In a half-hearted effort to demonstrate that the verdicts were *consistent* with the instructions, respondents suggest that under New Hampshire law the term "defect" has subtly different meanings depending on whether negligence or strict liability is at issue. Opp. 15 n.5. Because *the instructions* reflect no such differences, however, that explanation cannot reconcile the jury's disparate findings.

instructions did: had the jury followed the instructions, a "no" answer to the design defect question would inevitably have been followed by a "no" answer to the negligence question.

Although the form might have been rewritten to avoid the possibility of inconsistency, there is no basis to conclude that *Volkswagen* waived its rights by failing to identify possible pitfalls in the form that was used. One can just as easily attribute any shortfalls in the form to *plaintiffs*' failure to protect their interests. Moreover, it was *plaintiffs*' decision to proceed on both negligence and strict liability – disregarding the Supreme Court of New Hampshire's express warning *to plaintiffs* that "while both counts are permitted, we do not recommend * * * that * * * both * * * be submitted to the jury because of the confusion that is created" (*Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H. 1978)) – that created the possibility of inconsistency here. Volkswagen should not be forced to pay a $10 million price for plaintiffs' trial strategy.

In sum, because respondents' theory of waiver under Rule 51 is nonsensical, this case presents the Court with the opportunity to resolve the severe, important, and acknowledged conflicts under Rule 49 that are outlined in the petition. See Pet. 13-23. Volkswagen should not be saddled with a huge judgment that ignores a dispositive factual finding by the jury and offends New Hampshire's substantive law simply because the First Circuit decided – after the fact and in conflict with many other courts – that the special verdicts here were actually general verdicts and that Volkswagen's objections therefore should have come earlier. Instead, the Court should put to rest the confusion, injustice, and inefficiency that have plagued the use of special verdict forms in federal court, and have made Rule 49 a trap for the unwary, by reviewing the decision below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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No. 02-1677

In The
Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Petitioners,

v.

NATHANIEL TRULL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITIONERS

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MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari in the above-referenced case.*

PLAC is a non-profit association with 135 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed 43 briefs as *amicus curiae* in this Court (and over 600 briefs in state and federal courts combined), presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Exhibit A.

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* Petitioner consented to the filing of the attached brief, but Respondent did not.

Of all parties, product manufacturers are perhaps most adversely affected by the unpredictable application of waiver rules to objections to inconsistent verdicts. Federal courts regularly adjudicate product liability cases under state law that recognizes both strict liability and negligence, and permits plaintiffs to pursue both claims in a single action. Those claims invite inconsistency when both claims are founded on a defective design: a jury that finds no design defect on a strict liability claim cannot rationally hold the manufacturer liable for negligently designing or manufacturing that non-defective product, yet it happens with some frequency. Thus, in the product liability setting, parties need to know what objections they need to make, and when, to preserve the constitutional right to a rational verdict. PLAC members are accordingly vitally interested in ensuring that the preservation rules are consistently and fairly applied, so manufacturers have notice of how to assure judgment based on a rational verdict, and review if judgment is entered on an irrational verdict.

Conflict among the circuits' interpretation of Rule 49 and Rule 51, however, makes protection against inconsistent verdicts a lottery. There are conflicts among and within the circuits about (1) whether Rule 51 requires parties to object to submission of potentially inconsistent claims before the jury is charged; (2) whether Rule 49 requires parties to object before discharge of the jury to inconsistent general verdicts, inconsistent special verdicts, or both; and (3) where courts hold the duty to make a pre-discharge objection turns on whether the jury returned general or special verdicts, how to determine which verdict is which. Parties, and manufacturers in particular, therefore cannot know what objections are required when, and have no reliable way to assure they do not suffer from the

most fundamental of errors – judgment based on inconsistent verdicts.

As a representative of parties frequently faced with inconsistent verdicts, PLAC is well suited to share with the Court the broader perspective of the product manufacturing community on the extent of the circuit conflict, as well as its severe and recurring consequences. For these reasons, PLAC respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether, under Federal Rule of Civil Procedure 49, a party waives its objection to the entry of judgment in a manner inconsistent with the jury's finding on a mixed question of law and fact by failing to note the inconsistency before the jury is discharged.

2. Whether, under Federal Rule of Civil Procedure 51, a defendant's failure to object to the submission of a case to the jury on multiple liability theories waives a subsequent argument that the jury's findings on those theories are inconsistent.

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC")[1] is a non-profit association with 135 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed 43 briefs as *amicus curiae* in this Court (and over 600 briefs in state and federal courts combined), presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Exhibit A.

Of all parties, product manufacturers are perhaps most adversely affected by the unpredictable application of waiver rules to objections to inconsistent verdicts. Federal courts adjudicate many product liability cases under state law that recognizes both strict liability and negligence, and permits plaintiffs to pursue both claims in a single action. Those claims invite inconsistency when both are founded on a defective design: a jury that finds no design

[1] Pursuant to Supreme Court Rule 37.6, PLAC states that PLAC alone paid for the preparation of this brief.

defect on a strict liability claim cannot rationally hold the manufacturer liable for negligently designing or manufacturing that non-defective product, yet it happens with some frequency. Thus, in the product liability setting, parties need to know what objections they need to make, and when, to preserve the constitutional right to a rational verdict. There are conflicts among and within the circuits about (1) whether parties must object to submission of potentially inconsistent claims before the jury is charged; (2) whether parties must object to an inconsistent verdict before discharge of the jury; and (3) where duty to make a pre-discharge objection turns on whether the jury returned a general or special verdict, how to determine which verdict is which. The uncertainty on these issues leaves manufacturers in the dark about how to preserve their rights. PLAC's members accordingly have a strong interest in this Court's consideration of *Volkswagen of America v. Trull*, No. 02-1677, as it provides an opportunity to resolve the circuit conflicts on what constitutes a general or special verdict and what requirements a party must satisfy to preserve objections to inconsistent verdicts under Federal Rules of Civil Procedure 49 and 51.

SUMMARY OF ARGUMENT

This is a textbook case for review. Waiver is a threshold issue for appellate review, which can be dispositive of the case regardless of the underlying merits. The conflicts in the waiver rules concerning inconsistent verdicts are substantial and well-recognized:

- The courts of appeals disagree as to whether a party waives objection unless the party objects to an inconsistent verdict before the jury

is discharged: some courts hold that pre-discharge objection is required only for inconsistent general verdicts (under Rule 49(b)) but not special verdicts (under Rule 49(a)), and other courts hold that pre-discharge objection is required regardless what kind of verdict is at issue.

- Where the rule turns on the distinction between general and special verdicts, the courts of appeals further disagree as to how to tell one from the other.

- The courts of appeals disagree about whether Rule 51 requires a party to object to the submission of multiple theories to the jury at the outset.

These conflicts present a minefield for parties trying to preserve objections.

In product liability cases, the inconsistent verdict scenario is played out again and again, in court after court, in circuit after circuit. And the results are, truly, random and the consequences severe. In some circuits a party who made no objection at all before the jury was discharged gets review of the merits, while in others a party who objected (but by that circuit's strict rules not enough or at the wrong time) gets none. Thus, the conflicting waiver rules are, in many cases, outcome determinative. That should not happen, much less on an issue like inconsistent verdicts, where failure to review the issue can lead to entry of a wrong judgment, which in turn impugns the integrity of the judicial process and fundamentally undermines the right to a jury trial. This Court's guidance is badly needed.

ARGUMENT

The *Trull* case is not unique. It is hard for counsel to foresee verdict inconsistency, or appreciate its appearance in the moment the jury's verdict is read. Even when its risk is apparent, the governing law (often state law) may not permit effective prevention. And varying rules even within circuits make it impossible to know which objections are required for which kinds of inconsistency, and when they must be made. The best protection against these unpredictable waiver rules is to make what some circuits deem frivolous and meritless objections – itself a problem.

Review is appropriate whenever conflicts among the circuits prevent the uniform application of the federal rules. Review is particularly appropriate here. Entry of judgment on an inconsistent verdict risks subversion of the jury's intentions, liability where there should be none (or vice versa), and so threatens the integrity of the judicial system and fundamental constitutional rights. If ever the federal rules should be clear and consistent, it is here. But they are not, and the varying waiver rules can be outcome determinative, yielding an affirmance in one case in one circuit and reversal in an identical case in another circuit. The Court should grant review to put an end to recurring problems where the integrity of the judicial process is at stake.

I. THE LAW IS CONFUSED ON HOW TO PRESERVE OBJECTIONS TO INCONSISTENT VERDICTS.

There is tremendous confusion among, and even within, the circuits regarding what counsel must do to preserve objections to inconsistent verdicts.

A. The Conflict On Whether Pre-Discharge Objections Are Required.

The cases conflict on whether objections are required to inconsistent verdicts before the jury is discharged, and under what circumstances. The conflict is so baffling that one circuit has thrown up its hands, expressly acknowledging the confusion but postponing the chore of "untangling these [] precedents." *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274 n.4 (11th Cir. 2002). Bereft of guidance from the Court, cases deal with the problem in drastically different ways.

Some circuits seem to require pre-discharge objections regardless of whether the verdict is a special verdict under Rule 49(a) or a general verdict under Rule 49(b). *See Golub v. J.W. Gant & Assoc.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *Williams v. KETV Television*, 26 F.3d 1439, 1443 (8th Cir. 1994); *Seven Provinces Ins. Co. v. Commerce & Industry Ins. Co.*, 65 F.R.D. 674, 690 (W.D. Mi. 1975).

Other circuits hold pre-discharge objections are required for ***general*** verdicts under Rule 49(b), but not for ***special*** verdicts under Rule 49(a). *See, e.g., Simmons v. Philadelphia*, 947 F.2d 1042, 1057 (3rd Cir. 1991); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993); *Ladnier v. Murray*, 769 F.2d 195, 198 n.3 (4th Cir.

1985); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 726 (4th Cir. 1999).

Even *within* some circuits the law is confused. Take the First Circuit. *Bonilla v. Yamaha Motor Corp.*, 955 F.2d 150, 152 n.2, 155-56 (1st Cir. 1992), holds pre-discharge objections are required in cases involving ***special*** verdicts under Rule 49(a). In this case, however, the First Circuit's finding of waiver was tied to its finding that the jury returned general verdicts, implying the waiver rule only applies to ***general*** verdicts under Rule 49(b). *See Trull v. Volkswagen of Am., Inc.*, 311 F.3d 58, 62 (1st Cir. 2002). *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981), required pre-discharge objections without distinguishing between Rule 49(a) and Rule 49(b).

Among the courts that hold the rule turns on the Rule 49(a)/Rule 49(b) special/general verdict distinction, the agreement ends there. The courts disagree on what constitutes a special verdict under Rule 49(a) and a general verdict under Rule 49(b). For example, verdicts comparable to the verdict in this case have been characterized as both general and special, depending on the circuit. *See Simmons*, 947 F.2d at 1057-58 (special verdict); *McCollum v. Stahl*, 579 F.2d 869, 871 (4th Cir. 1978) (same); *but see Trull v. Volkswagen of Am., Inc.*, 311 F.3d 58, 62 (1st Cir. 2002) (general verdict); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 55-56 (2d Cir. 2002) (same), *cert. denied*, 123 S. Ct. 539 (2002). Once again, the courts acknowledge the conflict, but have not resolved it (if they have addressed it at all). *See Mason*, 307 F.3d at 1274-75; *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n.16 (3d Cir. 1993). The confusion over what is (or is not) a general or special verdict makes it difficult, and in some cases impossible, for parties to predict which waiver rules apply to their case.

Counsel cannot even rely upon a characterization of the verdict form by the consensus of the district court and the parties. For even if the form is labeled "special verdict," and is so described by the trial court and all parties, there is the risk on appeal (as happened here) of an unexpected "gotcha" holding: retroactive re-definition of the verdict form's character, and a corresponding retroactive application of surprise preservation rules that bar consideration of the merits.

Surprise waiver rules like that undermine the very foundations of the waiver doctrine. Waiver is an "*intentional* relinquishment or abandonment of a known right or privilege." *Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (quotation omitted) (emphasis added). To be intentional, abandonment of the right must be knowing. *See Cordrey v. Euckert*, 917 F.2d 1460, 1465 (6th Cir. 1990); *see also Collier v. Estelle*, 488 F.2d 929, 932 (5th Cir. 1974). Thus, the premise for finding a review-barring waiver must be that the party knew it was waiving rights in failing to object, and so intentionally give up the right to review. An unpredictable waiver doctrine defeats the premise: a party who cannot predict the duty to object does not knowingly relinquish rights in not objecting.

Without review by this Court, courts of appeals will continue to apply unpredictable rules for preservation of objections in direct contradiction with the "intentional relinquishment" requirement that justifies imposition of waiver's harsh consequences in the first place.

B. The Conflict Over The Need To Object To Submission Of Potentially Conflicting Theories.

The circuits also conflict over interpretation of Rule 51, and whether it requires a party to object to the submission of multiple theories to the jury to preserve objections to later inconsistency.

The First, Second, and possibly Eleventh, Circuits require an objection to the submission of multiple theories before the jury is charged. *See Trull*, 311 F.3d at 63; *Babcock v. General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002); *Jarvis*, 283 F.3d at 53-65; *Mason*, 307 F.3d at 1276 n.7 & n.8. In contrast, the Third Circuit has rejected the contention that failure to object to jury instructions and interrogatories under Rule 51 precludes a later argument that the verdicts are inconsistent. *See Loughman*, 6 F.3d at 103. Several other courts implicitly agree with the Third Circuit position by not requiring such an objection before conducting their review. *See, e.g., Oja v. Howmedica Inc.*, 111 F.3d 782, 790 (10th Cir. 1997); *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1147-48 (6th Cir. 1996); *Werner v. Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980).

This conflict leaves parties baffled about the proper time and way to object in cases at risk for inconsistent verdicts. The dilemma is worse still where the apparently-required objection is futile because the substantive law expressly permits the submission of the potentially conflicting theories that the procedural law would require parties to oppose. Indeed, this case is the paradigm: The First Circuit held that New Hampshire law allows both strict liability and negligence theories to go to the jury, yet condemned Volkswagen for failing to object to the submission of both to the jury. *Trull*, 311 F.3d at 63. Rule 11 and

ethical obligations potentially put counsel at risk if they make objections that are not well-taken. *In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991) (Rule 11 sanctions imposed where objections in complaint lacked any basis in law or fact); *Jazzland, Ltd. v. Bordenave*, 1999 U.S. Dist. LEXIS 7818, *6 (E.D. La. May 20, 1999) (party ordered to show cause why Rule 11 sanctions should not be imposed for frivolous objections in motion). And even if permitted, token objections doomed to failure are a waste of judicial time and should not be encouraged.[2] The uncertain preservation rules, however, encourage futile objections and could even force counsel to choose between preserving their clients' rights and complying with ethical rules. That cannot be right.

The conflicts here are real. The Court should resolve them.

II. THE CONFLICTS ARE IMPORTANT TO RESOLVE: RECURRING PROBLEMS, DISPARATE RESULTS, AND UNSUPPORTED VERDICTS.

This Court will grant review to resolve conflicts and assure uniform application of the Federal Rules of Civil Procedure. *See Becker v. Montgomery*, 532 U.S. 757, 762 (2001) (granting certiorari to ensure uniformity in Federal

[2] Requiring objections that the governing law holds meritless also forces parties to undermine their own credibility, in turn imperiling later motions or objections. *Honeycutt v. Mahoney*, 698 F.2d 213, 219 (4th Cir. 1983) (counsel should "not [ ] annoy or antagonize judge or jury by objections perceived by the judge to be meritless"). Preservation rules should not be designed to alienate the court.

Rules of Appellate Procedure); *United States v. F & M Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (granting certiorari because conflict involves application of provisions of federal rules); *superseded by statute on other grounds*, 352 F.2d 942 (D.C. Cir. 1965). That alone is reason for review here. The recurrence of the issue, the disparate results under the conflicting rules, and the erroneous judgments that result, make the case for review stronger still.

A. Inconsistent Verdicts Are A Recurring Problem.

The inconsistent verdict issue is a recurring one. Every case involving overlapping legal theories presents the potential for inconsistent verdicts. There are scores of reported cases addressing the problem, and countless unreported dispositions. In 2002 alone, the First Circuit decided two cases addressing the same inconsistent verdict issue under New Hampshire law (this case and *Babcock v. General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002)), and that Court has yet another before it in 2003. *See Cabrera v. Hyundai Motor Co.*, No. 02-2232 (fully briefed and to be argued this summer). That is just one issue in one circuit; 2002 saw many other inconsistent verdict issues. *See, e.g., Howard v. Antilla*, 294 F.3d 244, 250-251 (1st Cir. 2002); *Jarvis*, 283 F.3d at 55-56; *Mason v. Ford Motor Co.*, 307 F.3d at 1274-75; *El-Hakem v. BJY, Inc.*, 2003 U.S. Dist. LEXIS 8143, *18 (D. Or. March 19, 2003); *Frazier v. Boyle*, 206 F.R.D. 480, 493 (D. Wi. 2002); *Aerotech Res., Inc. v. Dodson Aviation, Inc.*, 191 F. Supp. 2d 1209, 1220-21 (D. Ks. 2002).

In the field of product liability alone, inconsistent verdicts are a perennial problem. The cases are frequent diversity cases in federal court, governed by state law that often invites inconsistent verdicts. Most states, like New Hampshire, recognize product design claims based upon both strict liability and negligent design. *See, e.g., Jiminez v. Sears, Roebuck & Co.*, 482 P.2d 681, 686 (Cal. 1971); *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 56-57 (2d Cir. 1992) (Vermont law); *Brown v. Yamaha Motor Corp.*, 691 P.2d 577, 579-80 (Wash. Ct. App. 1984); *Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp.*, 349 N.W.2d 280, 284 (Minn. Ct. App. 1984), *aff'd in part, rev'd in part*, 366 N.W.2d 111 (Minn. 1985). Both claims have as a predicate a design defect; if a design is not defective, it is not negligent to adopt it.

> A manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective because: (1) if a product is not unreasonably dangerous because of the way it was manufactured, it was not negligent to manufacture it that way and (2) even if the manufacturer was somehow negligent in the design or production of the product, that negligence cannot have caused the plaintiff's injury because the negligence did not render the product "unreasonably dangerous."

Garrett v. Hamilton Controls, Inc., 850 F.2d 253, 257 (5th Cir. 1988) (applying Texas law). *See also Oja*, 111 F.3d at 791; *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150-51 (6th Cir. 1996); *Witt v. Norfe Inc.*, 725 F.2d 1277, 1279-80 (11th Cir. 1984). Nonetheless, the states generally do not bar submission of both claims to the jury, and often have standard verdict forms that invite inconsistent verdicts by asking the jury to address negligent design even if the jury

has found no design defect on the strict liability claim. *See* Cal. Jury Instructions, Civil, Book of Approved Jury Instructions (BAJI) 16.11, Form of Special Verdict: Negligence and Products Liability (9th ed. 2003); Minnesota Practice Series: Civil Jury Instruction Guides, Special Verdict Form 75.94 (4th ed. 1999); Florida Standard Jury Instructions in Civil Cases: IX Model Jury Charges and Verdict Forms, Special Verdict Form for Model Charge 8 (2001). That makes for an inconsistent verdict nightmare: findings of negligent design in making a product with no defect.

This Court cannot change the state-law risk of inconsistent verdicts, but it can give clear guidance about the federal procedure for addressing it, so parties know what they must do to object, and courts know what they must do to avoid the problem or correct it when it arises. That guidance would be very helpful to many parties and courts.

B. Disparate Results And Unfair Verdicts.

A finding of waiver bars consideration of the merits. *See Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir. 1990); *see also United States v. Walton*, 255 F.3d 437, 441 (7th Cir. 2001) (waived issue "extinguishes all appellate review of the issue"); *Eagle Eye Fishing Corp. v. U.S. Dept. of Commerce*, 20 F.3d 503, 504 (1st Cir. 1994) (failure to object during administrative appeal barred judicial review).

Avoiding the merits is harsh in any case, and is particularly harsh where the issue is inconsistent verdicts. Inconsistent verdicts "undermine[] the validity and integrity of the judgment and may, in fact, run afoul of the

Seventh Amendment by allowing the District Court to usurp the jury's function." *See Mercer v. Long Mfg. N.C. Inc.*, 671 F.2d 946, 948 n.1 (5th Cir. 1982); *see also Figg v. Schroeder*, 312 F.3d 625, 643 (4th Cir. 2002) (citing *Mercer*); *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (in criminal bench trial, inconsistency alone is not intolerable but might "constitute evidence of arbitrariness that would undermine confidence in the quality of the judge's conclusion"). Entry of judgment on inconsistent verdicts necessarily disregards jury findings and gives little assurance that a fair and correct disposition was reached. *See Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-91 (2d Cir. 1988) ("Though [] Rule [49(a)] does not give guidance as to the proper course of action . . . it is plain that proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding."). That is true whether there was an objection or not; a judgment of liability based on negligent design disregards the jury's finding that the design was safe, and makes no sense.

Disparate waiver rules in the inconsistent verdict setting are outcome determinative: they lead to disparate results in like cases. Verdicts found inconsistent in a circuit with lax preservation rules will lead to a new trial. *See Bonin v. Tour West Inc.*, 896 F.2d 1260, 1262-63 (10th Cir. 1990); *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354-56 (9th Cir. 1987). But, as this case demonstrates, comparable verdicts in a circuit with strict preservation rules will lead to an affirmance of a judgment, even if the underlying verdicts clash and entry of judgment on one necessarily disregards the findings on the other.

That is fundamentally unfair. The same Rules of Civil Procedure govern all the district courts. It is not fair – or, we submit, constitutional – to permit strict preservation rules to sanction judgment entered against parties exonerated by the jury. It is not fair that disparate interpretations of preservation rules mean one party wins and another loses – not just the appeal, but the case – on the same objection record. *See Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts") (citation omitted).

The Court should grant certiorari to provide guidance on the proper rules of waiver under Federal Rules of Civil Procedure 49 and 51.

CONCLUSION

For these reasons, PLAC respectfully urges the Court to grant the Petition.

Respectfully submitted,

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